

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6193

JOSEPH EVERETTE BROWN AND THOMAS DEAN SMITH,
Petitioners,

—v.—

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

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RELEVANT DOCKET ENTRIES

<u>No.</u> <u>Pleading</u>	<u>Date</u> <u>Filed</u>
*1. Indictment	11/ 9/70
*2. Motion of defts. for Bill of Particulars	11/12/70
*3. Motion of defts. for order suppressing all evidence, etc.	11/12/70
*4. Motion of defts. to Dismiss Indictment.	11/12/70
5. Arraignment Order (JOSEPH EVERETTE BROWN): On 11/10/70 deft. waived formal arraignment & entered a plea of not guilty.	11/17/70
6. Arraignment Order (THOMAS DEAN SMITH): On 11/10/70 deft. waived formal arraignment & entered a plea of not guilty.	11/17/70
*7. ORDER: Motion to suppress sustained as to extent seeks to quash search warrant; motion to Dismiss taken under advisement; motion for Bill of Particulars sustained as to paragraphs 1-g, 1-h, 1-i, e-3—remainder overruled.	11/17/70
*8. Plff's Response to Defendants' Motion to Dismiss Indictment.	11/17/70
*9. Motion of defts. for order requiring plff. to identify any & all evidence, etc.	11/17/70
*10. Supplemental Motion of defts. to Suppress, with affidavits.	11/17/70
*11. ORDER: Motion of defts. to Suppress & supplemental motion to suppress overruled; assigned further hearing 11/19/70 9 P.M.	11/19/70

No. Pleading	Date Filed
*12. ORDER: Motion of Smith & Brown for Court to reconsider ruling on Motion to Suppress overruled; assigned for trial on Monday, 1/18/71 at 9 A.M.	11/30/70
*13. Motion of plff. for severance of the trial of the defts. SMITH and BROWN from the trial of deft. KNUCKLES.	1/12/71
*14. Bill of Particulars filed by United States.	1/18/71
15. ORDER: Oral motion of defts. BROWN & SMITH to waive right to jury trial not approved by the Court.	1/21/71
*16. ORDER—Motion of U.S. for severance of trial of deft. KNUCKLES is sustained and trial of deft. Knuckles assigned for 4/7/71 at 9 A.M.	1/22/71
17. ORDER: On 1/21/71 Jury trial begun but not concluded; cont. to 1/22/71 at 9 A.M.	1/22/71
18. ORDER: On 1/22/71 trial resumed but not concluded; cont. to 1/25/71 at 9 A.M.	1/25/71
19. ORDER: On 1/25/71 trial resumed but not concluded; cont. to 1/26/71 at 9 A.M.	1/26/71
20. Acknowledgement of Court's Advice of Right to Appeal as to JOSEPH EVERETTE BROWN.	1/26/71
21. Acknowledgement of Court's Advice of Right to Appeal as to THOMAS DEAN SMITH.	1/26/71
22. JUDGMENT & COMMITMENT (as to JOSEPH EVERETTE BROWN): On 1/26/71 deft. sentenced to 5 yrs. impr. ea. ct. concurrent.	1/27/71
23. JUDGMENT & COMMITMENT (as to THOMAS DEAN SMITH): In 1/26/71 deft. sentenced to 5 yrs. impr. ea. ct. concurrent.	1/27/71

<u>No.</u> <u>Pleading</u>	<u>Date</u> <u>Filed</u>
24. ORDER: On 1/26/71 jury trial resumed & concluded: Verdict of guilty both defts. on cts. 1 & 2.	1/28/71
24a. Plff's Exhibits No. 1-27 & 36-74, filed during trial Jan. 21 & 25, 1971	
24b. Deft's Exhibits No. 1-4 and A, filed during trial Jan. 21 & 25, 1971.	
25. Motion & Affidavit of Defts. SMITH & BROWN to Proceed on Appeal in Forma Pauperis.	2/1/71
26. Application of defts. for Bail pending Appeal.	2/1/71
27. ORDER: Defts. allowed to proceed on appeal in forma pauperis; Notice of Appeal heretofore Tendered ordered filed; Bail pending Appeal fixed at \$5,000.00 & Court Reporter to furnish transcript at expense of United States.	2/4/71
28. Notice of Appeal filed by defts. SMITH & BROWN.	2/4/71
29. APPEAL BOND in amount of \$5,000.00 executed by deft. BROWN.	2/11/71
30. APPEAL BOND in amount of \$5,000.00 executed by deft. SMITH.	2/11/71
31. Transcript of Evidence & Proceedings on 11/10/70 and on January 19-26, 1971. (3 separate volumes).	2/16/71

(NOTE: "*" Items are photocopies of original pleadings, originals retained in District Court for trial of an additional defendant).

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I, Davis T. McGarvey, Clerk of the United States District Court for the Eastern District of Kentucky, do hereby certify that the annexed and foregoing is the original record on appeal, except as indicated above, and relevant docket entries exclusive of subpoenas, in the case of United States of America versus Joseph Everette Brown and Thomas Dean Smith, No. 14,667 on the London Criminal docket.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Lexington, Kentucky, this 15th day of March, 1971.

DAVIS T. MCGARVEY
Clerk

By: /s/ Shirley E. Miller
SHIRLEY E. MILLER
Deputy Clerk

[SEAL]

GENERAL DOCKET

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Appeal from Eastern District of Kentucky, at London

Case No. 71-1188

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

VS

**JOSEPH EVERETTE BROWN, THOMAS DEAN SMITH,
DEFENDANTS-APPELLANTS.**

(Transport of Stolen Merchandise)

No. Below: 14,667 Criminal

Judge Below: Moynahan

Date of Judgment: January 27, 1971

Notice of Appeal Filed: February 4, 1971

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ACCOUNT OF APPELLANT

In Forma Pauperis

REMARKS

Certified record returned to District Court 1/11/72
 Exhibits returned to District Court 11/2/71

DATE	FILINGS—PROCEEDINGS
1971	
Feb. 18	Copy of Notice of Appeal and Docket Entries
Mar. 16	<i>Certified record</i> (1 vol. pleadings, exhibits and 3 vols. transcript), filed; and cause docketed
" 19	Appearance of counsel for Appellants
" 19	Appearance of counsel for Appellee
" 24	Orders appointing counsel for Appellants (Peck, J.) S-475
Apr. 21	Motion of Appellee for return of exhibits for use at trial of co-defendant (Granted—JWP)
May 3	Four copies of Brief for Appellants, with proof of service
" 3	Four copies of Appendix
June 4	Twenty-five copies of Brief for Appellee
" 7	Proof of Service of Brief for Appellee
July 18	Four copies of Additional Citation to brief for Appellee, with proof of service
Aug. 20	Four copies of Additional Citation to brief for Appellee, with proof of service
Oct. 12	Cause argued and submitted (Before: Edwards, McCree and Miller, JJ.) T-102

DATE

FILINGS—PROCEEDINGS

1971

- Dec. 20 Judgment of the District Court affirmed T-249
 " 20 Opinion by McCree, J.

1972

- Jan. 11 Mandate issued (No costs taxed)
 Opinion with mandate
 " 17 Copy of Appellants' motion to the Supreme Court
 for an extension of time within which to file petition
 for writ of certiorari
 " 24 Copy of letter to counsel for Appellant from the
 Clerk of the Supreme Court advising that the
 time for filing a petition for writ of certiorari
 was extended to 2/17/72
 Feb. 11 Motion of Appellants for stay of judgment, with
 proof of service
 " 14 Appellee's response to motion for stay of judgment,
 with proof of service
 " 22 Notice of filing petition for certiorari on 2/17/72
 (SC No. 71-6193)
 " 25 Letter from Office of the Solicitor General advising
 case was docketed and requesting transmittal of
 the entire certified record to the Supreme Court

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON**

No. 14,667

UNITED STATES OF AMERICA

VS:

**JOSEPH EVERETTE BROWN, THOMAS DEAN SMITH AND
CLINTON KNUCKLES**

INDICTMENT

**[Filed Nov. 9, 1970—Davis T. McGarvey, Clerk, U.S.
District Court]**

COUNT 1.

(Title 18, Sec. 371, USC)

THE GRAND JURY CHARGES:

**Beginning on or about the 12th day of June, 1970, and
continuing to and including the 28th day of August, 1970,
in the Eastern District of Kentucky,**

**JOSEPH EVERETTE BROWN
THOMAS DEAN SMITH and
CLINTON KNUCKLES**

**named as defendants herein, wilfully and knowingly did
combine, conspire, confederate and agree together and
with each other to violate Title 18, Section 2314 and 2315,
United States Code.**

**It was part of the same conspiracy that defendants,
Joseph Everette Brown and Thomas Dean Smith, would
steal merchandise from the warehouses of the Central
Jobbing Company, Cincinnati, Ohio.**

**It was also part of the same conspiracy that defend-
ants, Joseph Everette Brown and Thomas Dean Smith,
would transport by rental van the merchandise stolen**

from Central Jobbing Company, Cincinnati, Ohio, to Knuckles' Dollar General Store, Manchester, Kentucky, where such merchandise would be knowingly received by defendant, Charles Knuckles.

The Grand Jury charges that in furtherance of the aforesaid conspiracy, to accomplish the objects thereof, the defendants at the time and places hereinafter set forth did commit the following acts:

1. On or about June 12 and June 30, 1970, defendant Joseph Everette Brown did rent a U-Haul truck from Western Woods Humble Service Center, Cincinnati, Ohio.
2. On or about June 12 and June 30, 1970, defendants Joseph E. Brown and Thomas Dean Smith did steal a quantity of merchandise from Central Jobbers Company, Cincinnati, Ohio, and loaded it into a U-Haul truck.
3. On or about June 12 and June 30, defendants Joseph Everette Brown and Thomas Dean Smith utilized a U-Haul truck to deliver merchandise stolen from Central Jobbers Company, Cincinnati, Ohio, to Knuckles' Dollar General Store, Manchester, Kentucky, a city in the Eastern District of Kentucky, where it was knowingly received by Clinton Knuckles.
4. On or about the 28th day of August, 1970, defendants, Joseph Everette Brown and Thomas Dean Smith did steal a quantity of merchandise from Central Jobbers Company, Cincinnati, Ohio, with the intent and for the purpose of transporting said merchandise to Manchester, Kentucky, where it was to be received at the Dollar General Store by the operator of the store, defendant Clinton Knuckles.

COUNT 2.

(Title 18, Section 2314, USC)

THE GRAND JURY FURTHER CHARGES:

Beginning on or about the 12th day of June, 1970, and continuing to and including the 28th day of August, 1970,

**JOSEPH EVERETTE BROWN and
THOMAS DEAN SMITH**

did transport from Cincinnati in the State of Ohio to Manchester in the Eastern District of Kentucky, stolen goods, wares and merchandise, that is, numerous case lots of general merchandise contained in cartons stamped "Central Jobbers Company," of a value of more than \$5,000.00 and they then knew the said merchandise to have been stolen.

COUNT 3.

(Title 18, Section 2315, USC)

THE GRAND JURY FURTHER CHARGES:

Beginning on or about the 12th day of June, 1970, and continuing to and including the 28th day of August, 1970,

CLINTON KNUCKLES

did receive and conceal numerous case lots of general merchandise in cartons stamped "Central Jobbers Company," of value in excess of \$5,000.00, which were moving as part of interstate commerce from Cincinnati in the State of Ohio to Manchester, Kentucky, in the Eastern District of Kentucky, and he then knew the same to have been stolen.

A TRUE BILL

/s/ Wanda Faulconer
WANDA FAULCONER
Foreman

/s/ Eugene E. Siler, Jr.
EUGENE E. SILER, JR.
United States Attorney

* * * *

[fol. 4]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON NUMBER 14,667

UNITED STATES OF AMERICA, PAINTIFF

vs.

JOSEPH EVERETTE BROWN, THOMAS DEAN SMITH,
CLINTON KNUCKLES, DEFENDANTS

TRANSCRIPT OF EVIDENCE & PROCEEDINGS

* * * *

[fol. 13] The defendant, CLINTON KNUCKLES, was represented by Hon. Lester Burns of Manchester, Kentucky and Hon. Sampson Knuckles of Barbourville, Kentucky.

The following proceedings were had:)

THE COURT: All right, Mr. Clerk, let me see the motion to suppress.

Gentlemen, are you ready to be heard on the motion to suppress?

MR. BURNS: If Your Honor please, the defendants are ready.

MR. COOK: The United States is ready.

THE COURT: All right, gentlemen, I'm ready to hear you.

MR. BURNS: If Your Honor Please, we call as our first witness, Honorable J.M. Shelton.

The witness, J. M. Shelton, having been first duly sworn, testified as follows, on

DIRECT EXAMINATION

BY MR. BURNS:

Q. Sir, will you state your name to the Court, [fol. 14] please.

A. J. M. Shelton.

Q. Where do you live, Mr. Shelton?

A. Manchester, Kentucky.

Q. What official position do you now hold, if any, with the City of Manchester, Clay County, Kentucky?

A. City Police Judge.

Q. Sir, on the 29th day of August, 1970, what official position, if any, did you hold with that city?

A. City Police Judge.

Q. Judge Shelton, would you please take up and tell the Court in your own words what occurred from the moment the City Police cruiser arrived at your home on that day to take you to the jail in Clay County on some official business?

A. I don't think the city Police Court (sic) took me to the jail. I was called on the telephone.

Q. That will be fine—take up and tell the Court what occurred after you arrived at the jail.

A. Well, to begin with I was preparing to take my wife to the hospital. She was very seriously ill with asthma, and my phone rang and they wanted me at the jail. Well, I went to the jail—if I'm not mistaken, I walked up there, and when I got there there was high-way patrols, deputy sheriffs, county attorney, and a fellow [fol. 15] by the name of West there, I believe it was, from Ohio, and they had him under arrest, I was informed, for speeding, coming to Manchester, and they wanted me to sign a search warrant, and the County Attorney give me the blanks—

Q. Sir, do you have the original papers in your custody at this time?

A. I sure have.

Q. Would you please introduce those into the record, the affidavit and search warrant, and the return made thereupon by the executing officers?

A. I've got the search warrant right here. These were reached to me in blank form, and I was in a rush to get to the—

Q. I beg your pardon, sir?

A. These blank search warrants were reached to me blank by the County Attorney, and I was in rush to get my wife to the hospital and I signed them. I never noticed whether there was anybody's name on that affidavit or not, but I signed the blank—my signature is on it right now, and left it with the County Attorney to finish filling out.

Q. Sir, let's identify those two papers. One is an affidavit for a search warrant, is that correct?

A. That's correct.

Q. Judge Shelton, when you signed that in the Clay County jail on August 29, 1970, was it blank?

[fol. 16] A. It was in blank, that's right.

Q. Sir, the other paper is a search warrant, is that correct?

A. Yeah, search warrant in blank, and the affidavit that goes with it.

Q. And when you signed that search warrant on August 29, 1970 in the Clay County jail was it blank?

A. Yeah, they was all blank.

Q. After you signed those warrants did you depart from the jail?

A. I departed, yes, sir.

Q. And were they blank when you left?

A. They was blank, as far as I know, when I left. I went back to the house and took my wife to the hospital, and left it with the County Attorney.

MR. BURNS: We have no further questions, if Your Honor Please.

Q. Yes, would you please introduce those as Exhibits A. and B., the affidavit being A and the search warrant B.?

MR. COOK: We have no objection to their being filed.

THE COURT: All right let them be filed.

[fol. 17] (Reporter's note: Thereupon, the affidavit was filed and marked as Exhibit A for the Defendants, and the Search warrant was filed and marked as Exhibit B for defendants, and they are made part of the record herein and will be found attached to and made a part of the Clerk's record.)

THE COURT: All right, cross examine.

CROSS EXAMINATION

BY MR. COOK:

Q. Judge Shelton, who called you from the jail?

A. I couldn't tell you who it was called me from the jail. I thought it was the deputy jailer.

Q. Did you go immediately from your home to the jail?

A. That's right, I went straight up there.

Q. I understood you to say that there was a man there by the name of West at that time?

A. Now, that's what I understood. That's what they told us—a little short sawed-off fellow.

Q. And you understood that he was there by reason of his being under arrest?

A. Well, I had heard—I couldn't swear to this, but I had heard that they was there for the purpose of [fol. 18] searching a store in Manchester where they had had some stolen goods.

Q. Who told you that?

A. I can't recall now who it was told me that, but it was someone down in town that morning—Saturday morning. I believe it was on Saturday.

Q. Did this all happen on Saturday?

A. I think it was, best I recollect.

Q. Do you mean you had heard about this man, West?

A. I had heard a whisper of it. That's all—as far as anybody talking, now, it was gossip—I don't know

whether there was any fact to it, but I heard that, that there was going to be a store searched that day.

Q. You heard that before this incident of going to the jail?

A. I heard it that morning. I was down at the drugstore Saturday morning, and I heard that talk, by a bunch bunched up there in front of the drugstore.

Q. Mr. West was present when you arrived at the jail, is that correct?

A. I believe I see the man sitting right back there now.

MR. COOK: Mr. West stand up.

(Reporter's note: At this time a man stands in [fol. 19] the courtroom).

A. That's the man they had arrested for speeding.

Q. Now, did he, or anyone else, say anything to you there at that time concerning his wanting to make an affidavit for a search warrant? The affidavit that has been introduced here as Exhibit A does bear your signature, isn't that correct?

A. That's right, but when I signed them they were blank and I sent them over to the County Attorney, and he took them to his office, I understand, and filled them out. I don't remember whether Mr. West's name was on that affidavit when I signed it or not. I was wrecked up over the sickness of my wife, and I got out of there just as quick as I could get out.

Q. Well, did Mr. West sign this affidavit in your presence?

A. No.

Q. Did you as the Judge of the Manchester Police Court, swear him to that affidavit?

A. I turned that over to the County Attorney and he was to complete it.

Q. Well, did you administer an oath to Mr. West there at that time when you signed this affidavit?

A. No, I did not.

[fol. 20] Q. Now, is it also your testimony that the search warrant had not been completed and was blank at the time you signed it?

A. They were both blank, the affidavit and the search warrant was both blank when they was reached to me. I was sitting right next to the County Attorney and I turned them over to him when I signed them.

Q. Who gave them to you to be signed?

A. The County Attorney.

Q. That's Mr. Smith?

A. Yes, sir.

Q. And you signed them and gave them back to him?

A. I give them to him—I gave them back to him, and it was my understanding, now, that he was to fill them out, and I left and went to the house just as quick as I could get there.

Q. Did anyone make any statement to you at that time as to the basis of the search warrant?

A. Not in there.

Q. Nobody told you what the alleged grounds were?

A. No, all I knew was what I had heard that morning down there in town. Now, that's all I knew about it. I knew they had Mr. West in there arrested.

Q. But nobody said anything to you there at the [fol. 21] jail when you signed the affidavit and the warrant about the grounds for this search warrant?

A. No.

Q. They did not?

A. No.

MR. COOK: That's all, Your Honor.

MR. BURNS: If Your Honor Please, the defendants, and each of them, at this point, move the Court for an order sustaining the motion based solely upon the testimony of the issuing judicial officer, who has testified that the affidavit was signed in blank, and the search warrant was signed in blank, and no oath was administered to the alleged and purported affiant, and it was filled out later out of his presence.

We base this motion solely upon Section 10 of the Kentucky Constitution, and Fourth Amendment to the

United States Constitution, and we pray proper relief of the Court at this point.

THE COURT: What says the United States?

MR. COOK: We would like to call Mr. Charles Smith. [fol. 22] We would like to offer evidence.

THE COURT: All right. Do you want to introduce any more evidence, Mr. Burns?

MR. BURNS: If Your Honor Please, we would like to reserve our right to call one other witness.

THE COURT: Well, if you're going to call another witness on that subject, you will have to call him in chief unless it is something in rebuttal to the evidence introduced in chief.

MR. BURNS: It would be in the nature of rebuttal, if Your Honor please.

THE COURT: Then you don't have any more evidence in chief on this subject, is that correct?

MR. BURNS: No, sir.

THE COURT: All right, call a witness for the United States.

MR. COOK: Mr. Charles E. Smith.

[fol. 23] The witness, CHARLES E. SMITH, having been sworn, testified as follows, on

DIRECT EXAMINATION

BY MR. COOK:

Q. Would you state your name, please?

A. Charles E. Smith.

Q. Where do you live?

A. Manchester, Kentucky.

Q. What is your profession, Mr. Smith?

A. I'm an attorney.

Q. And do you hold an official position in Clay County, Kentucky?

A. Yes, I'm County Attorney in Clay County.

Q. And were you County Attorney in Clay County on August 29th, 1970?

A. I was.

Q. All right, you have been in the courtroom and heard the testimony of Judge Shelton, have you not?

A. I have.

Q. Would you state to the Court what occurred on the 29th day of August, 1970 relative to the issuance of the search warrant which has been introduced here as Exhibit B?

A. I was at home and received a call to come to the jail. When I got over there, I found that a man I [fol. 24] didn't know and never heard of, had been arrested for speeding, or reckless driving one—I disremember which. I tried to talk to him but he wouldn't talk. He told us what his name was, but he seemed to be frightened. And, whoever called me—I can't remember who it was, but told me to bring a search warrant and an affidavit. I stopped by the office and got 'em and went on over there. At that time I didn't know what it was. I had never heard anything about any search of any store, or anything else. Judge Shelton was there when I reached there, and we talked to this gentleman, Mr.—

Q. West?

A. West.

Q. Is that the young man who stood up back here in the courtroom a while ago?

A. He resembles the man. He didn't have as long hair at that time, as I recall.

Q. But do you recognize him now as being that same Mr. West who was present there?

A. Yes, I would say he was.

Q. All right, go ahead.

A. And he called Cincinnati, as I recall, and got money to pay his fine for reckless driving, or speeding, or whatever it was.

And, then, it was made known to me what he was there for. He had come there to meet the State Police,

[fol. 25] or someone, and as he came he was picked up by a deputy sheriff, I believe, or a constable. Anyway, I learned that there was to be a search of a store in town, and Judge Shelton said "I've got to leave. My wife is ill and I was preparing to take her to the hospital." He signed those, and whether he gave them to me or laid them on the desk, I don't know, in the jail.

Well, I made inquiry there to find out what it was, and I took the gentleman—someone else went along—I can't recall who, but went to my office and I prepared the affidavit and search warrant.

Q. You and Mr. West went from the jail to your office?

A. That's right.

Q. Now, when Judge Shelton signed the affidavit and the search warrant, had either of those documents been completed or filled out?

A. They had not.

Q. Had you brought them to the jail from your office?

A. As I recall I stopped at the office on my way from home and got an affidavit and a search warrant, because whoever called me said to bring those to the jail, but when I got there I found that the man was charged with reckless driving.

[fol. 26] Q. Then after the affidavit and the search warrant were signed by Judge Shelton, do I understand that he left?

A. He left, immediately.

Q. And you and Mr. West went to your office, is that correct?

A. That's correct.

Q. And there these forms were completed and filled out, is that correct?

A. That's correct.

Q. Who actually typed them out?

A. I did.

Q. And was this based upon information that Mr. West provided you?

A. That's right.

Q. When you were present at the jail and Judge Shelton signed these forms, was an oath administered there at that time to Mr. West?

A. I can't recall. There was some excitement on trying to get his fine paid. He seemed to be frightened, and at that time I didn't know what he was frightened over. I didn't know that he was a representative of the company in Cincinnati.

Q. Were there any members of the Kentucky State Police there at the jail?

[fol. 27] A. Perhaps so. I can't recall who they were, but it seems as though there were one or two there.

MR. COOK: All right, that's all. Thank you, sir.

THE COURT: Anything else?

MR. BURNS: No cross, Your Honor.

THE COURT: Just a minute, Mr. Smith. Would you come back please sir. I want to ask you something.

Was the signature of Mr. West on this document?

A. He signed it after I completed it.

THE COURT: After you completed it?

A. Yes.

THE COURT: It was not on there when Judge Shelton signed it?

A. It was not.

THE COURT: Was any of this matter in this affidavit or in this search warrant that's been written with a typewriter—was any of that in there when Judge [fol. 28] Shelton signed it?

A. It was not.

THE COURT: Just the printed matter was on the form?

A. Just the printed form was all.

THE COURT: And all blanks were filled in by you afterwards?

A. That's right.

THE COURT: And Mr. West signed it afterwards?

A. That's right.

THE COURT: All right. You may step down.

MR. COOK: Call William West.

The witness, WILLIAM WEST, having been first duly sworn, testified as follows, on

DIRECT EXAMINATION

BY MR. COOK:

Q. State your name.

A. William West.

Q. Where do you live, Mr. West?

A. Cincinnati, Ohio.

Q. By whom are you employed?

[fol. 29] A. Central Jobbing Company, Cincinnati.

Q. What is the nature of the business of Central Jobbing Company of Cincinnati, Ohio?

A. We have retail stores that we service the stores out of our warehouse in Cincinnati, which is Central Jobbing.

Q. What type of merchandise is distributed by Central Jobbing Company?

A. Soft goods, shoes, housewares, hard goods.

Q. What specific position do you hold with Central Jobbing Company?

A. I'm a buyer and a supervisor for the company.

Q. Were you in Clay County, Kentucky on August 29th, 1970?

A. Yes, sir.

Q. What was your purpose in being there?

A. I was there twice.

Q. That day or—

A. That day, yes, sir.

Q. Why were you there?

A. The first time I went into Knuckles Dollar Store. I walked around the store, observing the merchandise in the store. I left then and drove back to Pineville, Kentucky. As I got back to Pineville, Kentucky, there

[fol. 30] was a phone call that I should contact Mr. Allf of the FBI and a Mr. Cox with the State Police in London, which I tried to contact them and they was out. I called back to the State Police and explained what I was going to Manchester for to the man—I don't know, I've forgotten his name—I was talking to the State Police office, and he told me he would have two state policemen meet me in front of the courthouse in Manchester. So, that's why I was going back to Manchester the second time.

Q. Where were you when you were making these phone calls?

A. I was in the—I imagine it is the county jail.

Q. Pardon?

A. In the jailer's office—no, when I was making the phone call it was at Pineville, Kentucky.

Q. Pineville, Kentucky?

A. Yes.

Q. All right. Now, Mr. West when you were in Manchester on the first occasion on that day and in the Knuckles Dollar Store, you stated that you were observing certain merchandise in there, is that correct?

A. Yes, sir.

Q. Were you able to identify any of the merchandise which you saw in the store at that time?

[fol. 31] A. Yes, sir.

Q. In what way?

A. Well, there was a carton of shoes from Suave Shoe Company setting right in the aisle. It had our name on it. Almost every table in his store was filled with merchandise that I recognized being our merchandise from Central Jobbing Company.

Q. And had that merchandise been distributed through the regular channels of business from your employer to the Knuckles General Dollar Store?

MR. BURNS: Object.

THE COURT: Overruled.

Q. You may answer.

A. To my knowledge, we had never sold Knuckles Dollar Store any merchandise.

Q. Now, then after making these phone calls at Pineville, Kentucky, do I understand that you did return to Manchester?

A. Yes, sir.

Q. Will you tell the Court what occurred when you did return to Manchester on that second occasion on August 29th?

A. After I got there, or on my way in?

[fol. 32] Q. Well, on your way in, and the whole thing?

A. On my way into Manchester, which was on Route 11 out of Barbourville, I was going along—I don't remember the speed, there was an old car going very slow that I passed. After I passed this, the car was coming behind me like he was trying to stop me. I didn't know who it was—I didn't want to stop, so I didn't stop right away, and I went on maybe a mile and then I stopped the car. On stopping the car there was two deputy sheriffs got out and asked me where I was going. I explained to them where I was going, to meet the state police in front of the courthouse, and they told me I was under arrest for reckless driving, and I could not stop to see the state police.

One deputy sheriff rode with me in my car to the county jail and the other one followed me. Upon going into the county jail, I asked them, I said: "How much is my fine." I said: "I've got only \$20.00." They said it would be \$35.00. I didn't have \$35.00. The two deputy sheriffs left and left me with the jailer and I asked him could I make some phone calls. And when he said yes, I called the state police in London, Kentucky. I tried to reach the FBI, which I didn't reach. I called Mr. Abe Geller, the owner of the company I worked for. I called the Hamilton County Sheriff's department in [fol. 33] Cincinnati, and then the Judge came in—

Q. Is that Judge Shelton?

A. Yes, Judge Shelton came in.

Q. Very well.

A. And there was a lot of people running around—I don't remember names, but there were several people running back and forth, calling, and so forth, and they

wanted me to sign a search warrant and me not go to search the store. They wanted to send either the State Police, or somebody from the sheriff's department to search the store. Being in the business, I knew that there was no way possible that they could identify our merchandise because they wouldn't have the slightest idea of what they would be searching for. They tried to get me to tell them who I was going to get it for. So, finally they got me to a point where I told them it was for a retail store in Manchester, and I didn't want to say it where there was six or seven people there, where everybody knew what I was talking about.

They still insisted that I sign a search warrant, so the officers could go, and I wouldn't sign the search warrant at that point because I knew it would be ridiculous for someone not knowing the merchandise we carry, or anything else, to know it was our merchandise. And, also, I knew that there was a girl coming from—I had called Mr. Geller to have a girl come up from the [fol. 34] store there to pay my fine. I knew I would be out in a matter of a few minutes. I tried to explain that. I wanted to go with them to serve the search warrant, and there was no dealings there, and if my memory is correct, and at that time, like I said, I was upset—the judge did swear me in before we left as he was signing that, and then the County Attorney, which was Mr. Smith, he also tried to get me to sign the search warrant at that point. I told him that I could not sign it, because there was no way they could identify the merchandise.

Okay, it was maybe seconds later the phone rang, and as the phone was ringing the girl came with the \$35.00 to pay my fine, which, I'd like to note, I never got a receipt for, so I don't know what I was charged with. She paid my fine, and at that time the State Police took me and put me in his car and took me to the County Attorney's office, and at the County Attorney's office, they took me in—they shut the door, and no one was there, and the County Attorney typed out the search warrant.

Q. Was any member of the Kentucky State Police present at the county jail when this affidavit and search warrant were presented there?

A. There was two state policemen—one in uniform, and one wasn't in uniform at the time, but I saw him later in the uniform.

[fol. 35] Q. Do you know their names?

A. No, sir, offhand, I don't.

THE COURT: Did you sign the affidavit until you got to the County Attorney's office and he filled it in?

A. No, sir.

Q. You did not sign the affidavit at the jail in the presence of Judge Shelton?

A. No, sir.

Q. You stated that he administered an oath to you, is that right?

A. Like I said, I'm almost certain that he did. I remember somebody administering an oath at the time he handed the copies of the search warrant—the search warrant and the affidavit.

Q. When you were at the county jail in the presence of Judge Shelton were you shown these forms—the affidavit form and the search warrant form?

A. Yes, I saw the forms in someone's hand at the time they were talking about them. I really don't remember who had them at the time.

Q. I ask that Mr. West be allowed to look at the exhibits here, and I will ask you if you can identify those documents as being the forms you saw at the Clay [fol. 36] County jail?

A. Yes, sir.

Q. Now, after leaving the jail you and Mr. Smith went to his office, is that correct?

A. No, I went with the state policeman to Mr. Smith's office.

Q. But you then went into Mr. Smith's office?

A. Yes, sir.

Q. And at that place the affidavit was completed by Mr. Smith, is that correct?

A. Yes, sir.

Q. And the warrant was completed by Mr. Smith?

A. Yes, sir.

Q. And was it there that you signed the affidavit?

A. This affidavit?

Q. That affidavit?

A. No, sir.

Q. Look at the affidavit and tell me whether that is your signature on the bottom there?

A. This is my signature, yes, sir.

Q. When and where did you sign that affidavit?

A. I signed the affidavit on Sunday, August 30th, the day after the search warrant was issued. I signed another search warrant, which was torn up, or an affidavit, [fol. 37] which was torn up and put in the garbage, which wasn't detailed enough. On the next day Mr. Smith came into the store and asked me to come to his office. At that time he told me—I asked him at the time, I said: "Don't I need to sign that too?" And he said: "No." The next day Mr. Smith said he wanted to see me in his office, which I went to his office, and at that time he told me that he forgot to get me to sign it, and that I should sign it.

Q. Well, now, on what day of the week was August 29th?

A. It was on Saturday.

Q. And an affidavit was prepared that day which you signed?

A. Which I signed, yes, sir.

Q. And was that done at Mr. Smith's office?

A. Yes, sir.

Q. Now, when were you notified or advised that that affidavit had been destroyed?

A. It was—

Q. Was that done in your presence?

A. It was destroyed in my presence, yes, sir.

Q. On that day, the 29th?

A. Yes, and he typed out the other one while I watched him.

Q. In other words, you are saying that the affidavit [fol. 38] which you subsequently did sign was prepared there on the 29th of August?

A. Yes, sir.

Q. But you didn't sign it that day?

A. I didn't sign this particular one that day, no, sir.

Q. Why not?

A. I signed the one that was destroyed. Why didn't I sign it?

Q. Pardon?

A. I asked Mr. Smith if I should sign it—this one, when he completed this particular one, and he said: "You don't have to."

THE COURT: Well, when did you sign that?

A. This I signed on August 30th, on Sunday.

THE COURT: Well, when were you at the jail, on the 29th?

A. On the 29th, on Saturday.

THE COURT: What happened to the one you signed on the 29th?

A. It was destroyed. He tore it up.

[fol. 39] THE COURT: When did that happen?

A. That happened on the 29th.

THE COURT: After you had signed it?

A. After I had signed it, yes, sir.

THE COURT: Why did he tear it up?

A. He said it was in enough detail, or I asked him a question, if there was enough detail on it for a search warrant, and I guess he reconsidered and wanted to make it different.

Q. Now, so that first affidavit which you signed was torn up and thrown in the trash can, is that correct?

A. Yes.

Q. And Mr. Smith then proceeded to prepare a second affidavit?

A. Yes, sir.

Q. And that is the one which is introduced as Exhibit A, is that correct?

A. Yes, sir.

Q. Now—

THE COURT: That was signed the next day, is that right?

A. Yes, sir.

[fol. 40] THE COURT: And dated back to the preceding day? It's dated the 29th. Was it dated back?

A. No.

THE COURT: Is it dated the 29th?

A. Yes, it's dated the 29th.

THE COURT: But it was really signed on the 30th?

A. Yes, sir.

THE COURT: But the search warrant was issued on the 29th? Is that right?

A. Yes, sir.

THE COURT: All right.

Q. Was the Judge's signature on the second affidavit that was prepared there on Saturday afternoon?

A. You are asking me a question I don't remember.

Q. Do you recall when you signed it on Sunday, the 30th, whether or not the Judge's signature was on it?

A. No, sir, I don't.

Q. You don't recall?

A. No, sir.

[fol. 41] MR. COOK: That's all, Your Honor.

CROSS EXAMINATION

BY MR. BURNS:

Q. Mr. West, you are telling this Court that you signed one affidavit on Saturday, August 29th, 1970?

A. Yes, sir.

Q. You are also telling this Court that on Sunday, August 30th, 1970, due to your questioning it, it was decided that the first one was too vague or indefinite in describing the property?

A. Would you please repeat that. I didn't understand what you said.

Q. You are telling the Court that due to your questioning it, on Sunday the 30th of August, 1970, about the sufficiency of the description, that a new affidavit was signed?

A. No, sir, this was typed out—both affidavits were typed out on Saturday. I signed one of them on Saturday,

which was torn up. I signed another one on Sunday, which is the same thing we are looking at here.

Q. That you are looking at now?

A. That's right.

Q. And that affidavit which you have identified to the jury—I mean, to the Judge—excuse me, appears to be [fol. 42] the same affidavit that you signed Sunday, the 30th? That one there?

A. Yes, sir.

Q. And did you assist in the search on Saturday?

A. Yes, sir.

Q. The 29th of August, 1970?

A. Yes, sir.

MR. BURNS: That's all. Thank you.

MR. COOK: That's all.

THE COURT: You may step down.

MR. COOK: That's all we have, Your Honor.

THE COURT: Well, Gentlemen, what do you have to say about the search warrant? I want to hear from the United States?

MR. COOK: Well, I hardly know what to say. I think in the short time that I have been practicing law, which is about seventeen years, and certainly in the slightly more than eight years that I have been with the United [fol. 43] States Attorney's office, that I have never seen such an example of misconduct on the part of the representatives of the legal profession and the judiciary, and I'm talking about the County Attorney and the Police Judge who caused the execution of this affidavit and search warrant in the form and in the manner that this testimony has shown.

I think the affidavit and search warrant are certainly not worth the paper that they are written upon, and it would be futile and useless and very aggravating for me to argue otherwise, and I think that they are not worth the paper they are written upon for the reasons that I have stated.

THE COURT: The Court appreciates your candor. I don't think there's any doubt about it, as counsel for the United States has expressed, they are not worth the paper they are written on.

Of course, there was no affidavit. To the extent that the motion to suppress seeks to quash the affidavit and the search warrant allegedly and purportedly issued thereon—to that extent, the motion to suppress is sustained, and the search warrant is ordered quashed.

Now, as I understand this, this was a public store. [fol. 44] I'm not sure as to what posture that leaves the case in, Mr. United States Attorney. I don't know whether they went into the public portion of the store with the search warrant. Of course, they didn't have any requirement to do that if it was on a business day and it was open to the public. If they went into some other portion of it under the authority of the search warrant, why they didn't have authority to do it, and any search made under the authority of this search warrant to the extent that that was required, in my opinion, would be an illegal search.

The motion to suppress is sustained to the extent that it seeks to quash the affidavit and the search warrant and any search required to be and made thereunder.

* * *

[fol. 58] THE COURT: All right, let the motion be sustained as to Paragraph 3-E in addition to the paragraphs heretofore sustained, and let the remainder of the motion for a Bill of Particulars be overruled.

MR. BURNS: If Your Honor Please?

THE COURT: Yes, Mr. Burns.

MR. BURNS: I am quite concerned, if Your Honor Please, and give this advice to the Court in all concern. Each and every item, sir, that was obtained by this search was listed on a return consisting of these two sections. At the time the officers entered the store they did not exercise any public right of entry. They closed the door, escorted everyone out and searched from the front door to the back—

THE COURT: I will have to hear you Gentlemen further on that aspect of the case. I'm only ruling on the [fol. 59] motion to quash the search warrant. Now, there may be some question as to whether the search was made by the authority of the search warrant, or whether

the search was made with the search warrant in possession. Suppose they had the search warrant and didn't need it. I just use that by way of illustration. I want you gentlemen to advise the Court on that.

MR. BURNS: Yes, sir.

THE COURT: If you get a search warrant and go up here on the town square and search some public store, an officer goes in there with the search warrant, and something is laying right on the counter in plain view in the portion of the store to which the public has access, I'm inclined to think they didn't need the search warrant; that it was surplusage to get it, and that he had a right to look there whether he had it or not. But, if he goes back in the storage room behind the partition, or into the office, or somewhere that the public doesn't have access to and has a search warrant and the search warrant is not valid, of course, he can't use the search [fol. 60] warrant, and he can't use what he discovered back there.

But would the fact that they had a search warrant that was defective preclude them from looking where they had a right to look anyway? I haven't ruled on that. I was very careful to phrase my ruling to say that the search warrant was quashed and the affidavit was quashed, and to the extent the search was made pursuant to those, and under the authority of those, I was of the opinion that the search warrant to that extent was not—the search would not be a legal search.

Suppose you go up there—you see the point I'm making, don't you?

MR. BURNS: I do, yes, sir.

THE COURT: Suppose you go up there—we all understand it. Suppose you go up there in the drugstore on the corner and you've got a search warrant, and something is laying there on the counter, you didn't need the search warrant in the first instance. The fact that you have it doesn't derogate from what you could see in the portion of the store that you would have a right to go in as a member of the public, as I see it. I haven't

[fol. 61] ruled on that. You Gentlemen can advise me about that further.

Well, Gentlemen—

MR. BURNS: If Your Honor Please, we anticipate a supplemental motion.

THE COURT: Well, you file your motion. I can only rule on what is before the Court. But to all other extents this motion to—well, it is not styled, but it is called motion for an order suppressing all evidence oral or tangible, obtained directly or indirectly from the search of the premises at Knuckles Dollar Store in Clay County, Kentucky—to all other extents on the basis of the evidence that's been introduced here, it is overruled.

Now, Gentlemen, if you have some further motion, I can consider that at the appropriate time.

The only evidence introduced here before the Court was that this affidavit was not properly executed, and this search warrant was not properly issued, and to that extent the motion is sustained, and anything obtained under and by virtue of those—of that warrant—by virtue [fol. 62] of a search executed under authority of it, I would be of the opinion, it probably would be illegally obtained, unless it was in some portion of the store where you didn't need it to look. I'm not ruling on that. I'm just ruling on what was before the Court. I don't know, I assume there was an inventory filed on that, isn't there, Gentlemen?

MR. BURNS: There is, yes, Judge.

THE COURT: I don't know whether all that stuff was obtained by virtue of the search warrant or not. We may have a very nice problem here, Gentlemen, about that aspect of it.

MR. BURNS: It was, Judge.

THE COURT: Well, you say it. I will hear the evidence, Mr. Burns.

MR. BURNS: If Your Honor please, in view of the business of the Court, could we at this time obtain a date for a hearing on our supplemental motion?

THE COURT: Well, you file it and then I will give you the date.

[fol. 63] Now, Gentlemen, the Motion to Dismiss is taken under advisement. If you want to submit any authorities, submit them on or before 9:00 A.M. on Monday and I will attempt to rule on it before Court adjourns Monday, but I won't guarantee it. I don't think we can reach this case before some time Monday or Tuesday, or later in this session of the Court. Anyway, I'm of the opinion we can't, but if you want to file any authorities other than those cited here, or any memorandum in connection with the Motion to Dismiss the indictment, file it and serve a copy on the other side by 9:00 A.M. on Monday, and I will try to reach it Monday afternoon, but I won't guarantee it, Gentlemen. We have a very heavy docket in this Court.

All right, anything else?

Mr. Marshal, you may announce a recess of the Court until 9:00 o'clock tomorrow morning.

(Reporter's note: This concludes all proceedings heard in connection with the motions at this sitting of the Court).

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[fol. 64] THE COURT: All right, let the motion to dismiss the indictment be overruled, Gentlemen, upon the authority of, as to Counts 1 and 2, of Schaffer v. United States, 362 U. S. 511. In the opinion of the Court [fol. 65] it is clearly dispositive of the issue with respect to those two counts, and as to Count 1, on the authority of Pinkerton v. U. S., 328 U.S. 640; United States v. Katz, 271 U. S. 354; Pierra v. United States, 347 U. S. 1.

All right, Gentlemen, the motion to dismiss is overruled in its entirety.

Now, Gentlemen, what about the defendant's motion for an order requiring the plaintiff to identify any and all evidence which the plaintiff contends was legally seized from Knuckles Dollar Store on or about August 29, 1970, and for a motion for an order shifting the burden of proof to the United States Government to identify any and all evidence seized under the search warrant heretofore quashed by this Court on the grounds

that the evidence was commingled and seized? What do you have to say about that, Mr. United States Attorney?

MR. COOK: Your Honor, we object to it, and for the same reasons we object to this supplemental motion to suppress that they have filed here today. The original motion to suppress was filed and we had a hearing on that, and they had an opportunity to present such evidence as they cared to showing their objections to a [fol. 66] search of these premises, and it appears now that they are just making every attempt to try this case before Your Honor without the benefit of a jury, in hope that all of the issues may be decided to the detriment of the United States.

I don't think there's any authority requiring the prosecution to identify the evidence that we intend to use in the prosecution of this case, which is what they're asking for.

THE COURT: Well, let me ask you—I want to ask the defendants this first, and this is a thought that has occurred to me, Gentlemen, since the last hearing on this matter.

Do any of these defendants have any standing to question the legality of this search except Mr. Knuckles? What do the defendants, Brown and Smith have to say about that?

MR. BURNS: If Your Honor please, it is our position under McDonald v. United States, 69 Supreme Court 191 that any defendant against whom this evidence is to be used as prosecuting evidence has the standing to move to suppress.

THE COURT: Well, were any of these defendants [fol. 67] in the store at the time it was searched but Mr. Knuckles?

MR. BURNS: No, sir, they were not.

THE COURT: I just—as I reflect about this, Gentlemen, of course, Mr. Knuckles has a standing to question the search, but I wonder if these other defendants do.

Suppose ten people are charged in some sort of a conspiracy. In connection with that charge the premises of

some one of the ten are searched, whether it be a dwelling house or whether it be a store—would the other nine have any standing to question that search?

You Gentlemen on neither side has touched on that so far.

What do you have to say on that, Mr. United States Attorney?

MR. SILER: As Your Honor knows we went through this in Catlettsburg in the case of Zane Gray Wages and Clarence Epperhart. I think a case which is dispositive of this is Wong Sung against the United States. I don't have the immediate citation but I can get it within about [fol. 68] two minutes, but that was a case where some Chinese people, where one of them objected to the search of another party because of narcotics, and the Court did hold that the search was illegal as to the one it was found on, or the room he was found in, but this could not be used to suppress the evidence against another Chinese.

THE COURT: Well, was a conspiracy charged or were they jointly indicted?

MR. SILER: No, they were just separate cases, but it says it does not transfer to another party.

THE COURT: What is the case you are relying on, Mr. Burns?

MR. BURNS: If Your Honor please, it is McDonald v. United States, and it is the contention of these two defendants that if one who has a standing to make the motion, makes this motion and it is successful in the courts, then any defendant against whom this testimony is to be used has a standing to further—

THE COURT: What's the citation?

[fol. 69] MR. BURNS: 69 Supreme Court 191.

THE COURT: Let me see if we have that—69 Supreme Court.

MR. BURNS: 335 U. S. 451, Your Honor.

THE COURT: Well, I think that's the first thing we're going to have to decide, Gentlemen, whether they can all raise the question or whether only Mr. Knuckles can raise it.

MR. SILER: Would Your Honor indulge me while I go get mine?

THE COURT: Yes, sir, see if you can find it. All right, how long will it take you to get that, Mr. Siler, do you think?

MR. SILER: Oh, about five minutes.

THE COURT: Well, this Court will be in recess for ten minutes.

(Reporter's note: It now being 8:55 P.M., further [fol. 70] proceedings herein were in recess until 9:10 P.M., at which time the following proceedings were had).

THE COURT: All right, what do you have to say?

MR. SILER: The authority the United States relies on with regard to this particular aspect are two cases; one is Wong Sung v. United States case, 371 U. S. 471 which was decided in 1963, and another case in which it did involve co-conspirators and co-defendants from the Supreme Court, Alderman against the United States, 394 U. S. 165, and that case quite clearly states—and if the Court reads the concurring opinion in this case it can see exactly in a nutshell what it was. Mr. Justice Harlan when he concurs in part and dissents in part, states that the traditional rule is that there is no derivative standing of one person to object to a Fourth Amendment violation of another party, and I think that is directly in point in this case.

THE COURT: Is that a conspiracy case or were they jointly indicted, or what?

[fol. 71] MR. SILER: They were co-conspirators—it was a wire tapping charge, and the party whose wires were tapped, as I understand, was not charged, but he was a co-conspirator.

THE COURT: All right, let me look at these.

(Reporter's note: At this time there was a short pause in the proceedings while the Court examined the cases, after which the following proceedings were had).

THE COURT: All right, what do you have to say, Mr. Burns?

MR. BURNS: If Your Honor please, I rely upon those cases and *Jones v. United States*, 362 U. S. 257. Also I rely specifically upon Federal Rule of Criminal Procedure 41(e) which reads, in part:

"A person aggrieved by an unlawful search and seizure may move the District Court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that . . ." and [fol. 72] it lists the grounds, and those grounds we have asserted before this Court.

MR. SILER: Your Honor, for further clarification, I think in the Alderman case it was remanded concerning one of the parties who was a co-conspirator and who was convicted—his case was remanded because his wire was tapped, but the others, the Court held, did not have this standing.

With regard to the Jones case, I think in that case it said you should not have a technical finding of standing where a person is on the premises legally, and certain evidence found on those premises were used against him. It held specifically that he did not have to come and say it belonged to him or he owned it. I think that was the doctrine prior to the Jones case.

THE COURT: All right, let me read the Alderman case.

(Reporter's note: At this time there was a short pause in the proceedings while the Court read the case mentioned, after which the following proceedings were had).

THE COURT: Well, Mr. Brown, this Alderman case appears to be adverse to your contention. They say this: [fol. 73] I'm quoting from *Jones v. United States*:

"In order to qualify as a person aggrieved by an unlawful search and seizure one must have been a victim of a search and seizure, one against whom

the search was directed as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. . . . Ordinarily then it is entirely proper to require of one who seeks to challenge the legality of the search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy. This same principle was twice acknowledged last term." Citing *Mancusi v. DeForte* 392 U. S. 364, and *Simmons v. United States*, 390 U. W. 377.

"We adhere to these cases and to the general rule that Fourth Amendment rights are personal rights which like some other Constitutional rights, may not be vicariously asserted . . ." citing cases.

"There is no necessity to exclude evidence against one defendant in order to protect the rights of another. No rights of a victim of an illegal search are at stake when the evidence is offered against some other party. The victim can, and very probably will, object for himself when and if it becomes important for him to do so.

What petitioners appear to assert as an independent Constitutional right of their own to exclude relevant and probative evidence because it was seized from another in violation of the Fourth Amendment, but we think there is a substantial difference for Constitutional purposes between preventing the incrimination of a defendant to the very evidence illegally seized from him and suppressing evidence on the motion of a party who can not claim this predicate for exclusion . . ."

"In these cases, therefore, any petitioner would be entitled to the suppression of Government evidence originating in electronic surveillance violative of his own Fourth Amendment right to be free of unreasonable searches and seizures. Such violation would occur if the United States unlawfully over-

heard conversations of a petitioner himself or con-[fol. 75] versations occurring on his premises whether or not he was present or participated in those conversations."

That seems to say, as I understand it, that a party must have some Fourth Amendment right himself before he can question the search of someone else's premises.

MR. BURNS: If Your Honor please, we respectfully contend that the 'Alderman case did not overrule the McDonald case, although we do admit to the Court that apparently it has weakened the McDonald case—

THE COURT: In the McDonald case you have another proposition—they were both on the premises, weren't they?

MR. BURNS: Yes, sir.

THE COURT: And in this case you concede, do you not, that they were not on or about the premises?

MR. BURNS: In person, but we are dealing with property, Your Honor.

THE COURT: Sir?

[fol. 76] MR. BURNS: We are dealing with property.

THE COURT: I understand, but you concede for the purposes of this motion that they were not on the premises or near the premises at the time of the search, is that right?

MR. BURNS: That is correct.

THE COURT: And that the premises belonged to Mr. Knuckles, is that correct?

MR. BURNS: That is correct.

THE COURT: And that he was in possession of them?

MR. BURNS: That is correct.

THE COURT: Gentlemen, I just don't think that the defendants, Brown and Smith have any standing to question the search.

MR. BURNS: If your Honor please?

THE COURT: Yes, sir.

[fol. 77] MR. BURNS: Under the Katz case of the United States Supreme Court they clearly stated that when we are talking about Fourth Amendment rights we

are not talking about property rights, we are talking about personal rights.

THE COURT: I understand, Mr. Burns, but suppose ten people were indicted for some sort of a conspiracy and the Government agents searched the premises of one of them. Would the other nine who were not there and didn't own the premises, had no connection with it, have a right to question that search?

MR. BURNS: Under those circumstances, no sir. You have stated no connection in the case that you have stated to me. The indictment alleges a direct connection with three defendants in this case.

THE COURT: It alleges that they conspired to do certain things.

MR. BURNS: It alleges that they conspired, sir, and respectfully alleges that they did certain things.

[fol. 78] THE COURT: Anything else, Gentlemen?

MR. BURNS: I would just like to say this.

THE COURT: All right.

MR. BURNS: Please.

THE COURT: All right.

MR. BURNS: Indeed—this is in *Katz v. United States*, 389 U.S. 347:

“Indeed we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends, as well, to the recording of all statements overheard without any technical trespass under the law. . . .” *Silverman v. United States*.

“Once this much is acknowledged and once it is recognized that the Fourth Amendment protects people and not simply areas against unreasonable searches and seizures, it becomes clear that the reach of that amendment can not turn upon the presence or absence of a physical intrusion into any given [fol. 79] enclosure.”

With that we close on that point, Your Honor.

THE COURT: All right, Gentlemen, let the motion to suppress—the supplemental motion be overruled in ref-

erence to the defendants, Joseph Everette Brown and Thomas Dean Smith.

Now, Gentlemen, dealing with the motion for an order requiring the plaintiff to identify any and all evidence which the plaintiff contends was legally seized from Knuckles Dollar Store on or about August 29th, 1970, the Court has heretofore ruled that this search warrant was invalid. I assume that there's a return made on that search warrant showing certain property seized thereunder.

I am of the opinion that any property that was seized under circumstances that were such that a search warrant was not required for the seizure thereof, that property would be admissible in evidence.

As I understand it, this is a public store, and the evidence has been, or the affidavits in this record indicate that the officers went there with a search warrant, put the customers out and locked the doors, and searched. [fol. 80] I would be inclined to think that anything that was in the part of that they could have access to by just walking in would be admissible even though they went in with a search warrant, but anything that was in the back and in a portion from which the public was excluded, and which was not a public portion of the store, would not be admissible.

What does the United States have to say on that subject? Do you want to heard on it?

MR. COOK: In that respect I assume that the Court means to confine its remarks—

THE COURT: To the defendant, Knuckles.

MR. COOK: And to such evidence as might have been obtained pursuant to that search warrant?

THE COURT: Yes, which might have been obtained pursuant to the search warrant.

MR. COOK: Now, that is the evidence which Your Honor has indicated is suppressed?

[fol. 81] THE COURT: That's right.

MR. COOK: Now, it is the position of the United States in this case that certain evidence was obtained which was in open view and in a public store. It is the

position of the United States that these premises, as it were—this store building from which this property was seized was a general merchandise store of some nature and was open to the public.

Now, upon that theory we rely upon this Katz case, which Mr. Burns has previously cited—Katz v. United States, 389, 347, which in its dictum says that what a person knowingly exposes to the public even in his own home or office is not a subject of Fourth Amendment protection.

So it is our position in this case that certain property was seized which was exposed to the public, and, of course, we intend to prove that evidence in the trial of this case.

THE COURT: Let me ask you this, Mr. Cook: How are you going to distinguish between it? Are you going [fol. 82] to be able to separate it?

MR. COOK: Well, let me make this next statement and I think then the Court will see what the position of the United States is in this case. Even though Your Honor has suppressed such evidence as might have been seized as a result of this search warrant that was issued in Manchester, Kentucky on whatever day it was, it is the position of the United States that the complete search of these premises can be sustained on another ground, and that all of the evidence seized as a result of that search is admissible.

It is our contention that the search of these premises, aside and totally apart from that search warrant, can be sustained upon the ground of probable cause, or upon the theory that the Federal agents who assisted in the search had probable cause to believe that a violation of the Federal law had occurred, and that there was evidence of that violation on those premises.

It's our position that there were extraordinary circumstances involved. Now, I understand that you can't search a dwelling or premises without a search warrant upon probable cause alone. There must be some extraordinary

[fol. 83] circumstances, and we say that those extraordinary circumstances in this case are that this merchandise—these items that were seized was contraband and was known to be contraband by the Federal agent at the time the search took place and at the time the seizure took place.

It is our theory that this occurred on a Saturday afternoon and that there was no United States Commissioner readily available to the Federal agent and that this property which was the subject of this search which was seized was such that could be easily removed and hidden and disposed of by the time the Federal agent left Manchester, Kentucky and came to the nearest United States Commissioner, which I believe is here at London, Kentucky, and attempt to find him on Saturday afternoon. So, that is going to be our theory in this case, and we will attempt to establish that in the presentation of our case, and will attempt to introduce all of this evidence and this property that was seized.

THE COURT: Well, let me ask you this: You have a state search warrant and you go to execute it and it turns out to be invalid. As I understand the rule if the [fol. 84] search can be otherwise justified, the evidence is admissible, relying on United States against Jones, 204 F. Supp. 745; United States v. Boggs, 364 F. 2d 543, and United States v. 297 Federal 531.

But in those cases the search was upheld either as an incident to a lawful arrest or because the officer had probable cause to believe a felony was being committed in his presence.

Of course, if it was in a public place, he could testify as to what he saw under the authority of United States v. Golden, 413 F. 2d 1010.

But, I just wonder, Gentlemen, can you justify it on the ground—if the State warrant goes out, on the ground that you didn't have an opportunity to get a Federal warrant. I believe if it's going to be justified—I'm not ruling on it—it's going to have to be justified as a search incident to a lawful arrest or as a search of premises which were open to the public. I'm doubtful if you can

go into the back rooms of the store. I'm not ruling on it, as to the defendant, Knuckles.

What do you have to say about it, Mr. Burns?

[fol. 85] MR. BURNS: If Your Honor please, I will make this just as brief as I can.

THE COURT: We've got a lot of problems in this case, Gentlemen.

MR. BURNS: Yes, sir, to my mind there are several questions close.

Number 1. When does a public place cease to become a public place.

THE COURT: Well, I don't think because they locked the door and put the public out it would cease to have a public character, but I don't think they can testify as to what was in any part of it in which the public didn't go. I'm not ruling on that. I don't believe it would make it private by putting them out.

MR. BURNS: If Your Honor please, I respectfully disagree. They locked the door, if Your Honor please, at 4:00 o'clock.

Another strange coincidence in this case is the simple [fol. 86] fact that by the search warrant and the affidavit—these written papers that they had two days to prepare, Your Honor please, they could not identify the property with this. Mr. West testified in this Court that he had to go along to point the property out. How could any officer identify the property himself?

THE COURT: You say he testified, you mean it's in his affidavit?

MR. BURNS: He testified at the previous hearing that we had that he had to go along with the search to—

THE COURT: Oh.

MR. BURNS: —to show them the property to get because they could not know it. But, if Your Honor please, the lapse of time from 4:00 o'clock to 9:00 o'clock at night was simply for this reason, so the owners of the company could arrive at Manchester, Kentucky with some bills and receipts and numbers, and that when he arrived they then commenced searching at 9:00 o'clock at night.

My good friend, Mr. Cook, says this property could [fol. 87] be easily disposed of. I beg to differ with him. It took them some day and a half or two days to load it up and haul it out.

THE COURT: Gentlemen, I'm going to have to hear evidence on all the circumstances of this search. I can see that.

MR. COOK: I think that's right.

THE COURT: I think it's going to be a rather protracted matter for the Court to hear.

MR. COOK: Very well. I agree, Your Honor.

THE COURT: But I think I'm going to have to hear all the evidence with regard to the nature of this property, how the search was conducted, where they looked and what they found, and how it was identified. Of course, Mr. Burns interjects another note into it now, that the only way they could tell it was stolen property was by having Mr. West come in and point it out.

MR. COOK: Well, that, of course, is a point of contention. [fol. 88]

THE COURT: Well, I say, if the evidence bears that out.

Well, Gentlemen, I have ruled on the motion insofar as the defendants, Brown and Smith are concerned, and I have ruled on the Bill of particulars. I have ruled on the Motion to Dismiss the Indictment.

MR. BURNS: Sir, as to the burden of proof, if I may please.

THE COURT: Well, Gentlemen, I think I'm going to reserve my ruling on that until I hear the evidence in regard to the circumstances of this search. I'm going to reserve my ruling on the order requiring identification of the evidence which the plaintiff contends was legally seized until I hear all of this evidence. I'm going to reserve my ruling on the Supplemental Motion to Suppress insofar as the defendant, Knuckles, is concerned until I hear this evidence.

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[fol. 94] THE COURT: Let the record show the defendants and their counsel are present in the courtroom and the Attorney for the United States is present in the courtroom in the case of United States v. Brown, Smith and Knuckles, Number 14,667.

All right, Gentlemen, are you ready to be heard in reference to the further motions assigned for hearing at this hour?

MR. BURNS: Yes, sir.

MR. COOK: Yes, Your Honor, we are ready.

[fol. 95] THE COURT: All right, Gentlemen, I will hear you on that. If you want to make any statement in regard to those motions, I will hear from the defendants first and then from the United States. If you don't care to make any statement, you may call your witness.

MR. BURNS: We have no statement prior to the introduction of evidence.

THE COURT: All right, does the United States care to make any statement?

MR. COOK: As I understand it, this is a hearing upon the supplemental motion to suppress, is that correct?

THE COURT: Well, the supplemental motion to suppress was overruled as to the defendants, Brown and Smith. It is a hearing on that motion as to the defendant, Clinton Knuckles, and a further hearing on the motion for an order requiring the plaintiff to identify any and all evidence which the plaintiff contends was legally seized from Knuckles Dollar Store on or about [fol. 96] August 29th, 1970.

I assume, I can probably rule on that latter motion after I hear the evidence in regard to the search, Gentlemen.

MR. COOK: We are prepared to offer evidence at this time.

THE COURT: All right, let me ask you this: Are you assuming the burden on that subject, Mr. Cook?

MR. COOK: Yes, Your Honor.

THE COURT: All right. All right, if you are, call your witness.

MR. McILWAIN: If Your Honor please, may I be heard?

THE COURT: Yes, sir, Mr. McIlwain.

MR. McILWAIN: If I understood you correctly, you said that you had overruled the motion insofar as Brown and Smith are concerned on the supplemental motion?

THE COURT: Yes, sir.

[fol. 97] MR. McILWAIN: And my understanding is that it is on the ground that they didn't have standing to file the motion to suppress.

THE COURT: Yes, sir.

MR. McILWAIN: Because the feeling was that their Constitutional rights had not been violated.

THE COURT: Yes, sir.

MR. McILWAIN: I would ask the Court to be heard further in relation to that.

THE COURT: Well, is there any reason why I can't hear the evidence in regard to this search first, Mr. McIlwain?

MR. McILWAIN: No, Your Honor.

THE COURT: Well, let me proceed in that order, and if you want to be heard further with reference to the ruling of the Court as to the defendants, Brown and Smith, I will hear you at the appropriate time on [fol. 98] this.

MR. McILWAIN: All right.

THE COURT: All right, go ahead, Mr. Cook, call your witness. I want to try to find out what happened about this search, Gentlemen. It might be dispositive of a great many matters, and yet it may not. I don't know.

MR. COOK: The United States calls George Allf.

THE COURT: All right, come around, Mr. Allf.

The witness, GEORGE ALLF, having been first duly sworn, testified as follows, on

DIRECT EXAMINATION

BY MR. COOK:

Q. State your name.

A. George Allf.

Q. What is your place of residence?

A. London, Kentucky.

Q. By whom are you employed?

A. The Federal Bureau of Investigation.

Q. What position do you hold with the Federal Bureau of Investigation?

[fol. 99] A. Special agent.

Q. For how long have you held that position?

A. Seventeen years.

Q. To which resident agency are you assigned?

A. London, Kentucky.

Q. And how long have you been assigned to the London, Kentucky resident agency of the FBI?

A. For a little over two years.

Q. Did you make an investigation of the case now being tried?

A. Yes, sir, I did.

Q. Were you in Manchester, Kentucky on August 29, 1970?

A. Yes, sir.

Q. Were you in Manchester, Kentucky on that date on one occasion or more than one occasion?

A. On more than one occasion.

Q. How many times were you there on that day?

A. I was there twice.

Q. What day of the week was August 29th, 1970?

A. That's a Saturday.

Q. What time did you first go to Manchester, Kentucky on that date?

A. It was some after eleven A.M. in the morning.

[fol. 100] Q. Did you go to a particular location in Manchester, Kentucky shortly after 11:00 A.M. on August 29th, 1970?

A. Yes, sir, I did.

Q. To what location did you go?

A. Well, the first time I went from London to Manchester, I went to the residence of Trooper Harold Brashears.

Q. And who is Trooper Harold Brashears?

A. Trooper Brashears is a Kentucky State Police Trooper assigned to Clay County and living in Manchester, Kentucky.

Q. And was anyone with you at that time who had accompanied you to Manchester, Kentucky?

A. Yes, sir, there was.

Q. Who was with you?

A. Kentucky State Police Detective Robert Cox.

Q. And where is Detective Cox assigned? What is his post of duty?

A. Detective Cox is assigned to the London post KSP, which is also where Trooper Brashears—his post of assignment.

Q. After going to Manchester, Kentucky shortly after [fol. 101] 11:00 A.M. on August 29th, 1970, and after going to the Trooper's residence, did you then go to some other particular location?

A. Yes.

Q. In Manchester?

A. Yes, sir, Detective Cox and I proceeded to the town square in Manchester, Kentucky, to the area of Knuckles Dollar Store.

Q. At that time were just you and—who was with you then?

A. Detective Cox.

Q. Was the other Trooper, Brashears, with you at that time?

A. No, sir, he was not.

Q. What time did you approach the Knuckles General Dollar Store in Manchester, Kentucky on that occasion?

A. I'm not sure, but it would take about, at least, I'd say, after 11:00 o'clock, so I would estimate it at 12:30 P.M.

Q. Now, Mr. Alf, I would like for you to tell the Court what information you had at that time when you went to Manchester, Kentucky and when you approached the Knuckles General Dollar Store on the morning of August 29th, 1970, and I would state to you that you [fol. 102] may, I believe, repeat hearsay information that you had at that time.

A. At approximately 11:00 A.M. that morning I was at my home mowing the lawn when I received a telephone message from Kentucky State Police Detective Cox. At that time I learned that Detective Cox and the KSP in London had received a telephone call from a Detective Bode at the Hamilton County, Ohio Sheriff's Department. The call concerned the fact that in Ohio two men, one named Brown and one named Smith, had been arrested by Ohio authorities.

At that time they were in possession of a large amount of stolen merchandise from the Central Jobbers Company, Cincinnati, Ohio. They were arrested in a U-Haul truck and that after their arrest, and on interview, they claimed that they were in route to Manchester, Kentucky, to the Knuckles Dollar Store where they were going to deliver the stolen merchandise which they were arrested in possession of.

And, on their interview they stated that they had estimated that at least seventy-five to eighty (75-80%) per cent of the Knuckles Dollar Store was filled with stolen merchandise.

Since this was a possible violation of Federal law, De-[fol. 103] tective Cox and I decided to go to Manchester.

At that time I didn't know if there was a Dollar Store in Manchester, even.

So, Detective Cox and I first went to the residence of Trooper Brashears, and at that time we learned that there is a Knuckles Dollar Store, and it's on the town square in Manchester, Kentucky, and when we discussed this matter with Trooper Brashears he said that several nights, after midnight most of the time, he had seen deliveries made to the Knuckles Dollar Store from U-Haul trucks.

Q. Within what period of time prior to August 29th?

A. Well, he said on at least two prior occasions that he could recall, and even on other times he had seen them there, but couldn't exactly remember when, but he remembered it would always be late at night delivering from U-Haul trucks, for the most part, and he mentioned that one was a negro man and one was a white

man, in particular, that he remembered at the time, and that since Mr. Clinton Knuckles and his father-in-law, Tipp Smith, were in attendance when the goods were being unloaded into the store, that even though his suspicions were raised by the late night deliveries, but because the proprietors were on hand and deliveries were [fol. 104] being made into the store, they did not make any further effort to check it out.

So, Detective Cox and I then decided to go look at the store itself.

Q. Describe the store to the Court.

A. Well, the Knuckles Dollar store does face the town square in Manchester, Kentucky. It is a one-story store in itself, although there is an upstairs to part of the store. There are two front doors to it, and one side there is a Ben Franklin Five and Dime Store—that's on the left of the store. On the right of the store there's a room that looked like it was being used as a storeroom with "Muncy's" on top, and then next to the store front with "Muncy's" on it and what looked like it was being used as a storeroom, was a restaurant.

Q. What did you and Detective Cox do when you approached the Knuckles Dollar General Store on this occasion?

A. Well, without even going into the store we walked by it on the sidewalk and we walked by the two doors into the store itself, and the storefront I mentioned which has "Muncy's" over the top of it, the third door, is a storefront, but there's not a store open, and there were boxes observed in that room, and on the box closes [fol. 105] to the pane of glass facing the sidewalk, we saw a shipping label on a cardboard box.

Q. What was the identification on that shipping label?

A. That box had a shipping label on it that had the name Suave Shoe Company, Hialeah, Florida, shipped to Central Jobbers Company, and I forget the Street address, but it said Werk—W-e-r-k Avenue, Cincinnati, Ohio.

Q. In what room did you observe these particular cartons?

A. Well, the cartons—the room was full of cartons that I could see, but the one that I could read was very close to the glass at that time.

Q. And was this in a part of the Knuckles General Store?

A. No, sir, it was not.

Q. What particular location was it in?

A. It was in that storefront next to the Knuckles Dollar Store that I could observe.

Q. Incidentally, Mr. Alf, at that time how were you dressed?

A. Well, I had been mowing the lawn. It was summer time, and I had shorts on.

Q. And how was Detective Cox dressed?

A. I'm not sure—I think he had—I'm sorry, I just [fol. 106] don't remember.

Q. Was he in uniform?

A. No, sir, he was not.

Q. What did you do then?

A. Well, we decided to enter into the store itself. We went into the store area and split up, and at the end of three different aisles I found at least three boxes. each box had Central Jobbers Company either stenciled thereon or stamped thereon with a stamp of some kind. It said Central Jobbers, Werk—I forget the street number, but Werk—W-e-r-k Avenue, Cincinnati, Ohio. These boxes had been opened and they were being used at the end of the aisles as receptacles—I think they were more like trash receptacles within the store itself.

At that time we also observed doors leading from the store area which we were in, leading into the side of the building where we had observed this room that said "Muncy's" on the outside up on top.

Q. Describe, if you will, the physical layout of the inside of the Knuckles Dollar General Store.

A. Well, it appears to be—

THE COURT: Just a minute, Mr. Alf. You say there were doors between the Knuckles Dollar Store and the building which was labeled or marked "Muncy's". [fol. 107] Do you mean a door through the parting

wall—a doorway going from the Knuckles building into the Muncy building?

A. Yes, sir, as I recall it's a door through the common wall—

THE COURT: Was the door shut or open?

A. It was a two-panel swinging door type, and at that time I think the door was shut. I don't recall it being open.

THE COURT: All right, go ahead.

Q. Describe the physical arrangement of the inside of the Knuckles General Dollar Store.

A. Well, there are two entrances into the store from the front, and then there are various counters of merchandise displayed. The dimensions I don't really know, and there is an office area to the left rear of the store, as I recall, up on a raised platform. There was a shoe area to the rear of the store where shoes were on display, and, let's see, I think—I'm not sure about where the various other items of merchandise are displayed, but the area where I saw the boxes was more on the right-hand side of the store facing it, and I think Detective Cox went to the left-hand side of the store.

[fol. 108] Q. Was the store open for business at that time?

A. Yes, sir, it was.

Q. Were there members of the general public inside the store when you were there?

A. Yes, sir, there were.

Q. And is it your testimony that these cartons that you saw displaying the name of Central Jobbing Company, or Central Jobbers, were observed in the public area of the store?

A. Yes, sir, they were.

Q. How long were you in the store at that time?

A. At the most, five or ten minutes.

Q. Did you make any purchases?

A. Yes, sir, I did.

Q. What did you buy?

A. I bought a pair of leather gloves—leather work gloves for \$1.00.

Q. Did you and Detective Cox leave the store together?

A. Yes, sir, we did.

Q. Did you at that time have occasion to go into any other area of the store than which you have testified about?

A. No, sir, I did not.

[fol. 109] Q. Did you at any time on that occasion look into any other area of the store?

A. No, other than the storefront I mentioned, and also from the outside next to the Dollar Store.

Q. Have you made any determination as to who had control of this other part of the building that you testified about seeing these cartons in?

A. At that time I did not, no, sir.

Q. Did you at a later time?

A. Yes, sir, I did.

Q. And what determination did you make?

A. Well, if I can take it chronologically, when Detective Cox and I left the store, we held a little huddle to find out just what we had found, because we had no corroboration at that time that this merchandise, or anything, was stolen from interstate, other than we did actually corroborate the Cincinnati information that there were Central Jobbers boxes in the Knuckles Dollar Store in Manchester, Kentucky.

Q. How did you corroborate that?

A. Well, the first thing we wanted to know was Knuckles Dollar Store a legitimate customer of Central Jobbers of Cincinnati, because if they were a legitimate customer than what we found would be purely not of any consequence.

[fol. 110] So, rather than go in the store again we went out to the Manchester city dump, hoping to try to find boxes of some kind that had been consigned to Knuckles Dollar Store from Central Jobbers.

Q. Why did you go out there looking for those boxes?

A. Well, like I say, we had no information that the Knuckles Dollar Store was not a legitimate customer of Central Jobbers.

We did make a little search around the dump, and we did actually find another cardboard box carton, and it also had Suave Shoes on it, but it was so wet that we really couldn't make out the consignee of that box from the Suave Shoe Company.

So, we decided again that we had no real reason to do any further investigation in Manchester, that what we needed was corroboration from the Central Jobbing Company in Cincinnati.

Q. During that first occasion at the store did you or Detective Cox seize any of the merchandise found in the store?

A. No, sir.

Q. Explain to the Court what you did after you and Detective Cox left the store?

A. Well, we decided to return to London, Kentucky [fol. 111] to contact Ohio authorities to find out if the Central Jobbing Company was a legitimate customer, to see if the information we had found out there actually was Central Jobbers boxes in Knuckles Dollar Store—we tried to find out if that was information of consequence.

Q. And what did you do?

A. In that regard we returned to London, Kentucky, and we went to the Kentucky State Police post.

Q. What did you do there?

A. As soon as we got there the radio dispatcher at London advised us that Trooper Brashears had been trying to get hold of us—the message from Trooper Brashears was that there was somebody from Central Jobbers Company in Manchester at that time getting a search warrant for the Knuckles Dollar Store.

Q. Go ahead and explain to the Court, if you will, at that time just exactly what occurred and what information you received from that point on.

A. Yes, sir. Detective Cox and I immediately jumped in our car and hurried as fast as we could back to Manchester, Kentucky. We arrived back in Manchester, Kentucky, which is approximately 22 miles from London,

arriving on the town square in time to see officers walking towards the Knuckles Dollar Store.

There were some cars that had pulled up—as I re-[fol. 112] call, there was, at least, one or two cars. Since I was driving, Detective Cox got out of the car and joined the other officers. I parked my car and then ran across to try to catch up with them.

Q. Who were these other officers?

A. I don't remember them all. In particular, I do remember the Clay County Sheriff, Cotton Gibson. He's the only one I specifically remember at that time entering the store, and then Detective Cox also joined Sheriff Gibson at that time.

Q. Go ahead.

A. By the time I got in the store Detective Cox was reading a search warrant to Mr. Clinton Knuckles, or, at least, to the person I later know to be Mr. Clinton Knuckles, and I was just more or less standing by, at least, ten feet away, listening, and then I heard Detective Cox also verbally advise Mr. Clinton Knuckles of his Constitutional rights.

Q. In what way did Detective Cox advise Mr. Knuckles of his Constitutional rights?

A. It was an oral advice of rights.

Q. Was it the usual Miranda warning?

A. Yes, sir, it was.

Q. For the record, the Clinton Knuckles that you speak about, is that the defendant, Clinton Knuckles, [fol. 113] in this case?

A. Yes, sir, it is.

Q. Tell the Court what happened then.

A. Well, as I say, I was standing by observing this action when my attention was drawn to a very excited young man running around the store area causing a large commotion.

Q. Do you know the identity of that individual at this time?

A. At that time I did not. I had never seen him before in my life.

Q. Do you now know his identity?

A. I now know him to be Mr. William West, who is associated with the Central Jobbers Company of Cincinnati, Ohio.

Q. Is he the man who testified in this hearing on the last occasion when this case was being heard?

A. Yes, sir, he is.

Q. Tell the Court what happened at that time?

A. Well, because of the commotion Mr. West raised, my attention was drawn to him. He was running around the store in a very excited, nervous fashion, shouting "this all belongs to my company, this is ours." Words to the effect that thousands and thousands of dollars worth, it's all ours out of our store in Cincinnati, Ohio. [fol. 114] I finally was able to get to this man. I identified myself and then I learned he was Mr. William West, and he gave me his home address and said he was employed by Central Jobbers Company in Cincinnati, Ohio.

Q. Was the store open to the public at that time?

A. It was and there were customers inside at that time.

Q. All right, go ahead.

A. Well, I said: "You are saying all of this is stolen, how do you know it's stolen?" And he said: "Well, I know my merchandise. I know every stick of merchandise my company handles." And I said: "Could this company, Knuckles Dollar Store, have come into this legitimately—you're saying it's all stolen?" And he said: "No, it's impossible because Central Jobbers has its own warehouse and they maintain their own stores." He said: "They only sell and service their own stores—they don't sell to any other stores, like, for instance, Knuckles Dollar Store—there's no way in the world that this would come into their hands legally."

Q. In what area of the store were you situated at that time?

A. At that time we were still over in the right-hand area of the store.

[fol. 115] Q. Is this the area in which there were public customers?

A. Yes, sir, there were customers in that area at the time. It was still within the first, I'd say, five or six minutes after I entered the store at that time.

Q. All right, tell the Court what happened then.

A. Well, I was still not satisfied in my own mind that I was really hearing Mr. West right. So, I questioned him further, and I asked him: "How do you know this is your merchandise?" I said "These clothes look alike—it's just like many other purchasers could handle these clothes." And he said: "No, not this array of merchandise." He said. "There's certain labels that only my company handles and certain jobbers that we deal with, or suppliers." And he said: "Look at these shoes." By that time we were back to the rear of the store in the shoe department. He said: "These shoes . . ."

THE COURT: Wait just a minute. Was that still in the public part of the store?

A. Yes, sir, the public part of the store.

THE COURT: All right.

A. He said: "These shoes are on sale for \$7.00 in [fol. 116] Knuckles Dollar Store, but they cost my firm more than \$7.00 at jobbers prices." He says: "At discount, or even at wholesale and then retail, they should be well above \$9.00—at least, \$9.00, possibly more." He said: "Here they are on sale for \$7.00 and they cost the jobber more than \$7.00." And then I asked him, I said: "How can you tell shoes from shoes?" And he said—he took a shoe from the rack, and he said: "See these numbers in these shoes, these are our numbers." And I said: "Do you mean to tell me that only Central Jobbers has this series of numbers here?" And he said: "Absolutely." He said: "These shoes have our numbers put on back where they are manufactured." He said: "This series of numbers in the shoes indicates it was manufactured a certain year and they're sold at a certain price provided in the contract." But he said that is an actual identification of the shoes from Central Jobbers out in the actual store area, selling for less than it cost the jobber.

Q. How much merchandise at that time did he identify in the public area of the store as being that of Central Jobbers of Cincinnati, Ohio, and which, according to him, had been stolen?

A. Well, like I say, he was very excited and he was quite expansive at the time, and he kept waving his hands around and saying: "Every bit of this comes from [fol. 117] our store in Cincinnati—this is all ours."

Q. And what did you do then?

A. Well, I am an investigator, and I heard that part of it, so I went to Mr. Clinton Knuckles. I introduced myself to Mr. Knuckles. I advised him of his rights again.

Q. Now, are you speaking of the defendant in this case, Clinton Knuckles?

A. Yes, sir, I am.

Q. State to the Court what rights you advised him of at that time?

A. I advised Mr. Knuckles of the same rights that Detective Cox had been mentioning to him, but I also wanted to advise him of the same. I said he has the right to remain silent; that anything he says can be used against him in court; that he has a right to the service of an attorney; that if he could not afford one, one could be obtained for him; that he could stop answering if he decided to answer questions, at any time; that anything he said at that time still could be used against him.

Q. Was anything said at that time to Mr. Knuckles concerning a search of the store?

A. Well, at that time I still was not convinced of anything. I told Mr. Knuckles that there was a man came in here and he obtained a search warrant, and I [fol. 118] said: "He claims everything in the store is his, belongs to his firm in Cincinnati." I said: "Mr. Knuckles, you have possession of this property, you must have your invoices, can you bring out those invoices to show that you obtained this property legally?"

Q. Mr. Allf, did you see the search warrant about which you testified?

A. Not at that time. I saw Detective Cox only as he held it up reading it to Mr. Knuckles.

Q. Have you seen it at a later time?

A. Not until the next day.

Q. Is that the search warrant that has been introduced here as Exhibit B, I believe?

A. I haven't seen it, but I'm sure it must be the same one.

MR. COOK: Would the Clerk show that exhibit to the witness?

(Reporter's note: At this time the exhibit referred to is handed to the witness).

Q. The Clerk has handed you a search warrant, and, possibly, an affidavit that has heretofore been introduced in this case. Is that the search warrant that you saw the following day after this happened on August 29th, 1970?

[fol. 119] A. Yes, sir, Mr. Burns handed me some copies of this the next day, and it appeared to be the same warrant that I have here.

Q. By Mr. Burns, are you referring to Mr. Lester Burns, Attorney for the Defendants in this action?

A. Yes, sir, I am.

Q. Where did he hand you a copy of that search warrant?

A. Well, it was the next day, that would be Sunday, the 30th, in the store and the warehouse area next to the store, what we determined to be the warehouse area later, as we were loading the items from the store on to a truck.

Q. Now, going back to August 29th, did Mr. West at any time identify himself to you as holding a particular position with Central Jobbers out of Cincinnati?

A. Yes, sir, Mr. West did identify himself as being an employee of the Central Jobbers Company, sent down there by his employer. But, before that even, if I may volunteer something—

Q. Yes, go ahead.

A. —when I talked to Mr. Clinton Knuckles like that—I said: “Is there any way, since you have possession of these goods, bring out your purchase orders, and so forth, your invoices—something to prove you have [fol. 120] legal possession of it”—

Q. What happened there?

A. And he said: “Do I have a right to my lawyer did you say”, and I said: “Yes, sir, you do.” And he said: “I don’t have to say anything, do I?” And I said: “Well, no, but don’t you see what they are trying to do.” I said: “This man came down from Cincinnati, he’s got a warrant, and they may unload your whole store.”

Q. And then what happened?

A. He didn’t answer. So, I then went back to Mr. West, and I said: “Mr. West, can you really say that all of this came from your company in Cincinnati and that it’s stolen property?” And he affirmed once more, he said—I remember this—he said: “This was stolen from our company in Cincinnati”, and like I say, he was very excitable, he was keyed up, and he said: “I know every bit of this.” He was quite expansive about his merchandise.

Q. What happened then?

A. I pointed my finger, and I said: “Mr. West if you say this is your merchandise, how can you prove it? It’s one man’s word against the man owning it or having possession of it.” And he said: “I can prove it by our own inventory—our records at our firm at Central Jobbers in Cincinnati, Ohio.” And, I said: “Well, we are going to stand by and wait until you get the records.”

[fol. 121] A. Mr. West went to Mr. Knuckles and he said: “May I use your telephone” and Mr. Knuckles let him use the telephone, and, in my presence, Mr. West called a number through long distance in Cincinnati, and he spoke to a Mr. Geller. I heard him say “Mr. Geller, I’m at the store. We’re going to get everything—it’s all here—this is all our merchandise—the store is full of merchandise—it’s all our’s, even the store-

room next door." And he said: "But the officers here won't let me have any of it until we prove by some way that it is our's"—their's meaning the Central Jobbers Company. And, so then he told Mr. Geller where certain records were—file cabinets I think he mentioned, back in the office, and he hung up, and he said that his employer was on the way to Manchester and that he would bring the records to back up his proposition that this store containing this merchandise was filled mostly with items stolen from Central Jobbers Company.

At that time I was still talking to Mr. West. I said: "Are you sure that you can back this up?" And he said: "Yes, I've been in that back room and it's almost completely filled with boxes with our company name on them." So, he said: "It's all ours and I know it has been stolen." He said: "Over the past several years we have been losing merchandise to the extent that our [fol. 122] eighteen stores have now shrunk . . ." or dwindled down to, I think he said twelve or thirteen— . . . "and they're in the process of closing another store because of the losses to the company through missing merchandise."

Q. Do you know what he was referring to when he mentioned the back room?

A. Yes, sir, I do.

Q. Explain that to the court.

A. Well, some time while this was all going on and I mean, while I was talking to Mr. Knuckles, for instance—I don't know exactly when, but the doors leading from the storeroom into the storage area—the swinging doors that I mentioned—at least the door area through the common wall, were propped open and he had been in there and that's when he mentioned that it was full of boxes with Central Jobbers Company's stamp on it.

Q. All right, go ahead.

A. Well, we were waiting for Mr. Geller, or this man from Central Jobbers to bring these records down. As a Federal investigator I wasn't about still to enter into any of this until I had some corroboration, other than one man's word against another, that a Federal

crime of possession of stolen property, transported interstate, was being committed in my presence. It took several hours, and I'm not sure of the time element here, [fol. 123] but I'm sure it must have been about 8:00 or 9:00 o'clock when Mr. Geller did arrive. At that time, we had left the store; we had gone and we had had dinner ourselves, and it must have been, at least, 9:00 o'clock, I think, by the time Mr. Geller arrived.

Q. That is 9:00 P.M.?

A. I would estimate 9:00 P.M.

Q. On August 29th?

A. On August 29th.

Q. Now, during this period of time while you were waiting for Mr. Geller, tell whether or not the Knuckles General Dollar Store was closed and locked?

A. Yes, sir, at a later time it was closed to the public, as far as customers coming.

Q. All right, what happened then?

A. Well, we were waiting for Mr. Geller, and sometime during that time, having seen these boxes, and having been told that those boxes were in the back room, I went in that back room sometime while we were waiting for Mr. Geller.

Q. What did you observe there?

A. At that time I saw the store room was piled high with many boxes, and Central Jobbers Company, Werk Avenue, Cincinnati, Ohio was marked on almost every box, and most every box was sealed.

[fol. 124] Q. Now, after Mr. Geller had arrived what happened?

A. When Mr. Geller did arrive he came in and he introduced himself—said he was with Central Jobbers Company—I've forgotten, he gave me his position, either President or General Manager, and again, I asked again, I said: "Has merchandise been stolen from your firm?" And he said it had. He said over a period of years—he repeated this same information that Mr. West had said, about losing so much inventory and so forth, that they were closing stores to try to stay in business.

Then he brought in the file cabinets and we took the file cabinets that they brought down containing company records back into the storeroom area where we found the stenciled numbers on some of these sealed cartons coincided with numbers off of the company invoices and records.

At that time I felt I was officially entering the case as far as a Federal investigator was concerned. The Federal Statute requires \$5,000.00 or more of stolen property to be transported interstate. So, I directed that an inventory be arranged and that enough of this merchandise would be set aside in the store area in the value of \$5,000.00 or more, and actually identified through Central Jobbers' records, by their numbers, which could [fol. 125] be positively matched up with the numbers on the boxes and on the company records.

We piled those from the storage area into the store area, and at that time we inventoried each box, and the values were furnished by Mr. William West of the Central Jobbers Company. The prices he quoted to me, and on my inventory that I was keeping at the time, were costs to Central Jobbers Company, and he mentioned that the actual price of this at retail would be much more than the jobbers' cost.

But we inventoried more than \$5,000.00 on the inventory by their records.

Q. What type of merchandise was this?

A. It was varied clothing and shoe merchandise—for the most part it was shoes, as I recall.

Q. What was the value, if you recall, approximately that was placed upon this merchandise by Mr. Geller?

A. Of the part that we set aside in the store itself?

Q. Yes.

A. I think he estimated around \$5500.00 or \$5600.00. I'm not quite sure, but we counted more than \$5,000.00 worth.

Q. And this was on the night of August 29th?

A. Yes, sir. At that time it was approaching, I [fol. 126] would say, 11:00 or 12:00 o'clock.

Q. All right, tell the Court what happened additionally on that occasion.

A. Well, once I decided that there actually was records from Central Jobbers Company backing this up; that I had at least two persons from Central Jobbers Company saying this property had been stolen in Cincinnati, and I had information from the Ohio authorities, through Detective Cox, that two men had been arrested in Cincinnati in route to Knuckles Dollar Store, by their story, and based on my own private, independent observations in the store itself, from the sidewalk itself, I was certain then, in my own mind—at least, on probable cause, that a Federal violation of Federal law was being committed in my presence; namely, possession of stolen property transported interstate of the value of \$5,000.00 or more. So, my first thought was I had the power to arrest Mr. Knuckles at the time, but in thinking it over and talking it over with Detective Cox, I had no reason to believe that it would be hard to find and locate Mr. Knuckles at a later date.

So, my immediate concern then placed itself on the merchandise in the store and in the storage area of the store.

I decided I'd better back up my own feelings in this [fol. 127] matter, and that's when I went to the Sheriff's office and called Mr. Cook up, the Assistant United States Attorney, and discussed this with you.

Q. And I believe at that time I authorized the filing of a complaint in this action?

A. You said you would even authorize the arrest of Mr. Knuckles on the spot if I so desired.

Q. And what action did you take at that time?

A. I said: "I don't think that's the problem right now. We have two men that I know in custody in Cincinnati, I'd rather not arrest Mr. Knuckles at this time—I'd rather center my activity on the merchandise because it was late on a Saturday night; early Sunday morning," and I was concerned maybe the merchandise might be missing if we left it there.

Q. Was this the type of merchandise that could be easily removed from the Knuckles General Dollar Store?

A. Yes, sir, it was in cardboard boxes. They were different sizes, but each one box would usually would be lifted by one person at that time.

Q. And then what did you do?

A. Well, Mr. Cook, as you recall, we decided what we could actually do with this merchandise if we considered it to be in violation of Federal law. I knew that the U. S. Marshal usually takes possession of items seized [fol. 128] as evidence, but as a practical matter the United States Marshal had no facility in Manchester, Kentucky to take possession of merchandise — I just couldn't call—we had one Marshal in London, and I didn't feel like I should drop this in his lap on a Sunday night.

Q. You mean, on Saturday night?

A. On Saturday night, or early Sunday morning. So, in discussions with you, Mr. Cook, we decided if we could take a complete inventory of the contents which we were seizing, if we could get a complete copy of this to Mr. Clinton Knuckles, as proprietor of the store itself, we would seize the merchandise, if I gave a complete copy to him and told him that Mr. Geller—and keeping for myself the original inventory and furnishing a copy to the Kentucky State Police—that as a practical matter the only way we could actually hold on and seize this merchandise would require the cooperation of Mr. Geller.

Mr. Geller said he had a huge moving van type vehicle in Cincinnati and he was willing to take the inventory—or take the items inventoried and agreed—he would agree then—I'm still talking about our conversation—

Q. Yes, sir.

A. —that he would agree to take possession of this merchandise, sequestering the requisite amount of merchandise necessary to secure Federal jurisdiction in this matter, then that we would allow him, if he would so do, take possession of the property, and on completion of our phone call I went back to the store, and I had a conference with Mr. Geller—by this time it was well after midnight, and Mr. Geller said he would call his firm and have his truck driver to drive the truck down to Manchester, Kentucky.

So, we were all getting very tired at that point—it had been a long day, and we decided that we would return home and get some sleep and when the truck would arrive the next morning, we would show back up and start our actual inventory, and then begin to remove items from the store. Up to that point we had not taken one item of merchandise from that store.

Q. Did you then leave the Knuckles General Dollar Store?

A. After the Kentucky State Police and the Manchester City Police Department, and I think, possibly, the Sheriff's Department, that was an agreement there among local officers—I was by myself—I was the only Federal agent in attendance—local officers did agree to post guard there at the store that night. Mr. Knuckles did lock the store up, turned on night lights, and provided the officers outside on guard with a key to the [fol. 130] store.

Q. And did you return the following day, August 30th?

A. Yes, sir, I did.

Q. What happened then?

A. Well, soon after we arrived—at that time I did ask for more help—we had two other agents that responded, and soon after my arrival, I think, the truck from Central Jobbers Company did arrive from Cincinnati, and then we started the inventory that I mentioned. Soon after that inventory was stated again, someone—I think it was Detective Cox, said that he had learned that there was an additional storeroom upstairs over the store, and that he heard it was also full of more merchandise from Central Jobbers. So, we obtained the key from Mr. Knuckles on that—I think it was Detective Cox got the key, and I believe one of the other FBI agents went up and then came back saying that there was a complete storeroom upstairs as large as the one downstairs, containing merchandise from Central Jobbers Company.

Q. And did you examine the upstairs storeroom?

A. At that time I didn't. I was handling the inven-

tory downstairs, seeing each item as it was removed from the store, and Mr. West was with me—we were in-
[fol. 181] ventoring and estimating value at that time. Later on that day on Sunday I did go upstairs just to take a look around out of interest.

Q. Now was some merchandise removed from the store on Sunday, August 30th, 1970?

A. Yes, sir,

Q. And is that the merchandise that you had gathered and had been inventoried on the previous night?

A. Yes, sir, the first items put on the Central Jobbers truck was the box—came out of the boxes that we had taken into the store area itself and inventoried in excess of \$5,000.00. Those items were first put in the truck and then sequestered by tying them separate, and then they sprayed paint on some of those boxes to indicate that that would be the sequestered part of the merchandise that we would keep separate for use as possible evidence in court.

Central Jobbers agreed to keep that same merchandise sequestered under our direction.

Q. Was any property removed from this upstairs storage room?

A. Yes, sir, when we saw the Central Jobbers labels on it, Mr. Geller and Mr. West both went up there and they identified it also as stolen property from their firm in Cincinnati, and a second phase of the inventory was [fol. 182] started at that time. Two phases of the inventory were being carried on at the same time, one downstairs in the storeroom, and one upstairs in the store-room, and then the items would be removed and put on the truck.

It soon became apparent that the moving van itself would soon be filled and Mr. Geller said he had another truck in Cincinnati, and it might be necessary to use it. So, he called the second truck down.

Q. And did that truck arrive?

A. That truck arrived later that day and it was also almost completely filled, I think. Each item taken contained the name Central Jobbers on each carton, or on

each box, as I recall, and inventoried, and estimated as to the price by Mr. West.

Q. And what time did this activity terminate on Sunday, the 30th of August?

A. I'm not certain of the exact time, but I would estimate around 9:30 or 10:00 o'clock at night.

Q. And was that the extent of your contact then at the Knuckles General Dollar Store?

A. Yes, sir, it had been another long day, and we returned home.

Q. Now, Mr. Allf, I think you've gone over this in great detail—I've attempted to ask you all the questions that I think are pertinent, but if there is any information [fol. 133] which you think is relevant to this search and seizure of this property, I would like for you at this time to state that to the Court.

A. Yes, sir, I think there's some other very valid items in mind reasonably believing that a felony—a Federal felony had been committed in my presence.

When I mentioned that I was in the store while the warrant was being read to Mr. Knuckles, and I observed Mr. West in a very excited manner running around inside the store, and we talked about the shoes and the price of the shoes, and then I asked Mr. Knuckles for his reaction to this, and received no reply, I also contacted at least two other officers during that time, one, I know, was Sheriff Cotton Gibson from Clay County, and Sheriff Gibson said why yes, he had seen on various occasions late night deliveries from a U-Haul rental truck to the Knuckles Dollar Store, but because it was late at night and on weekends, even though his suspicions were aroused, that Mr. Clinton Knuckles, and usually his father-in-law, Mr. Tipp Smith, were in the area and there, and since they were there, his suspicions carried no further, and he did not investigate further to determine about the merchandise, but he says he did recall that these items had been delivered late at night in U-Haul trucks.

Substantially, that same information was provided to [fol. 134] me by Patrolman Sizemore of the Manchester City Police Department.

And also at sometime in that period I also saw Kentucky State Trooper Muse, and he said he had also seen late night deliveries from U-Haul trucks into the Dollar Store, but that because all the time Mr. Knuckles was present, he didn't make any further investigation.

Q. And did—

A. I think these are all valid elements in my feeling that I had probable cause to enter into this investigation.

Q. Did you have all of this information at or before the time you entered Knuckles General Dollar Store?

A. I had all that information before I went into the storage area, but at that time I was in the store as I received all that information—in the public area of the store itself, and most of it was received before the store area was closed to the general public.

MR. COOK: That's all.

THE COURT: Cross examine.

CROSS EXAMINATION

BY MR. BURNS:

Q. Agent Alf, you are not telling the Court that [fol. 185] you entered the Knuckles Store on August 29 to purchase a pair of gloves, are you?

A. No, sir.

Q. Isn't it a true that the sole purpose of your entry into this store was to assist the Kentucky State Police, and other officers, in the execution of this so-called search warrant?

A. No, sir.

Q. It isn't?

A. No, sir.

Q. Tell the Court why you were there then after you saw the other officers on the premises with a search warrant?

A. Sir, that was the second time I was in the store when you're talking about the search warrant.

Q. The first time that you went in why did you go in?

A. The first time, as a Federal investigator, I was trying to determine if a Federal violation of law was being committed in my presence.

Q. You saw from the street one carton through the window in the storage room?

A. No, sir.

Q. With a label on it?

A. With a label on it, yes, sir.

[fol. 136] Q. Tell the Court what was in that box that you saw?

A. I have no idea.

Q. You do not know and did not know at that time whether it contained anything or not, did you?

A. No, sir. It could have been empty for all I know.

Q. Now, sir, I want you to tell the Court what you saw in each of those empty boxes with Central Jobbing labels thereupon in the store?

A. You mean, the boxes I saw—

Q. Yes, sir.

A. —in the store area itself open to the public—

Q. Yes, sir.

A. —where merchandise was for sale?

Q. Yes, sir.

A. Those boxes were being used, as far as I can remember, as trash receptacles. They had items of paper, or refuse, in them.

Q. Mr. Allf, will you please tell the Court why you, in your capacity as a Federal officer, after observing all this stolen property the first time you were in the store, why you did not arrest Mr. Knuckles?

A. Sir, I did not know that it was stolen property [fol. 137] at that time.

Q. You did not know, in the public part of that store, any one item that was allegedly stolen property, did you?

A. Not one single item.

Q. Isn't it true, Agent Allf, that you did not know one item of property which was supposed to have been stolen of your own knowledge at any time in that store?

A. Either time?

Q. At any time, unless it was pointed out to you or identified by someone else?

A. That's right, or identified by someone else.

Q. Isn't it also true that no officer assisting you, in your presence, knew that any item of merchandise was stolen until—or allegedly stolen, until it was identified by Mr. West or Mr. Geller?

A. From personal knowledge?

Q. From personal knowledge?

A. No, sir, we did not know it was stolen. That's the reason we returned to—

Q. Now, George, isn't it true—

THE COURT: Wait just a minute. Let Mr. Alf answer.

Go ahead.

A. I say, that's the reason after the first time in [fol. 138] the store when we returned to London, Kentucky, we went out in the town dump.

Q. I understand that.

A. We had no idea whatsoever it was stolen. In fact, we assumed that Mr. Knuckles was probably a legitimate customer of Central Jobbing Company.

Q. Do you know what type of stores, or the company name of the Geller stores?

A. No, sir.

Q. Were they Ben Franklin stores—do you know?

A. No, sir, I don't know.

Q. Sir, I want you to go back to the first \$5,000.00 worth of inventoried property.

A. Yes, sir.

Q. This property came from the storage room, is that correct?

A. Yes, sir.

Q. And was carried out into the public part of the storeroom—the public store?

A. Yes, sir. If I can explain that, when Mr. Geller brought his file cabinets in, which contained records of Central Jobbers Company, the actual file cabinet was taken back into the storage room, and I was back there and I had a sheet which the inventory was taken on, and

[fol. 139] we was laying one carton to near where the file cabinet was, and then from my personal knowledge I would say here's some numbers on this box that has Central Jobbers on it, and here's some numbers, do you have any record in your company files and records indicating that this number matches any number that says Central Jobbers on it, and they would take those numbers and they would riffle through their papers until they found the record, and that's when I would inventory that particular carton, and I placed my initials thereon, and then for a place to keep these cartons to themselves, we took the sealed cartons out into the store area itself through these doors that I mentioned in the common wall.

Q. Now, sir, will you please answer my question.

A. Yes, sir.

Q. The first \$5,000.00 worth allegedly came from the private storage room?

A. Yes, sir.

Q. And was carried out into the open public store?

A. Yes, sir.

Q. And this occurred some time after 9:00 o'clock Saturday night, the 29th?

A. Yes, sir.

[fol. 140] Q. That is the alleged evidence that you now have sequestered and marked for the alleged purpose of the prosecution of this action?

A. Yes, sir.

Q. I want you to tell the Court where the \$5,000.00 worth is, if it was there, that you seized from the public part of this store?

A. You mean, in addition to what we carried in the sealed boxes?

Q. Yes, from the public part of the store, what did you seize?

A. We seized no goods that I can recall from the stands, except the shelves for display purposes—in other words, goods from boxes which had been opened, except that we did find in the storeroom itself other sealed cartons later on during our search, and those cartons also were taken and returned—seized.



THE COURT: Were they in the back part of the store or in the front of the store?

A. No, sir, the store front of Knuckles Dollar Store has a glass window area, and there's a shelf area on the inside of the glass window area, and up above on that shelf there, on the inside of the store, there was more merchandise stored with Central Jobbers on it.

[fol. 141] **THE COURT:** You took some of that in the inventory?

A. Yes, Sir, that's all in the inventory.

THE COURT: That's in the front part of the store, is that right?

A. That's in the front of the store, yes, sir, on the shelf up above the window.

THE COURT: All right, go ahead.

Q. Tell the Court what you had to do to observe that?

A. That was covered by a curtain, as I recall or a piece of material covered most of it. All we could see was the bare box.

Q. You had to pull that back to see it?

A. Yes, sir, that had to be moved to see the entire carton.

Q. And it was not plainly and open to the general public, was it?

A. No, sir.

Q. Now, Mr. Ott (sic) would you please explain to the Court why Mr. West, a man who allegedly knew this property, had to pick a shoe up to identify it?

A. Well, the shoes had the numbers on the inside [fol. 141] the shoe, and you can't see them unless he showed them to me where I could actually see numbers, and I asked him to make sure those numbers were his company numbers.

Q. Isn't it true that even he, being a person who allegedly knew the property, had to pick the shoe up and turn it over and look inside on the side of it—

A. Absolutely.

Q. —to identify it?

A. Yes, sir.

Q. And the general public walking through could not even see that number, could they?

A. Yes, sir, anybody can handle the merchandise and look at the shoes.

Q. They could not see it sitting down on the stand though, could they?

A. I think for the most part, at eye level, they could actually see the stands themselves. They could look above eye level. They were stands, I'd say, at least five to six feet tall.

Q. And they were just numbers.

A. Numbers inside the shoes, yes sir.

Q. Right, insufficient for you to identify the property as being Central Jobbers Company's property?

A. For me, yes, sir.

Q. Yes, sir, or any of the officers, to your knowledge, [fol. 142] that were present?

A. Yes, sir.

Q. Now, Mr. Ott (sic), isn't it true that the search of these premises were made through, by and under the authority of the alleged search warrant?

A. No, sir, I had nothing to do with that search warrant.

Q. Sir, that isn't what I'm saying. It was my understanding you assisted in the search.

A. No, sir.

Q. Did you make it or assist in it?

A. I assisted no one. I was there at that time to conduct my own independent investigation.

Q. You were searching for the Federal Government, and the State Police were searching for the State, is that what you're saying?

A. No, sir.

Q. Isn't it true, Mr. Ott (sic), you say you had probable cause? I believe you referred to those words.

A. Until I figured that I had probable cause, I did not enter into the investigation, nor search, nor seizure of that store.

Q. Until you thought there was \$5,000.00 involved in property, is that correct?

[fol. 143] A. That's right. That's when I organized my own private inventory that I now have the original copy of.

Q. So, up until that point, by what authority did this search—was this search being made, and you on the premises at 9:00 o'clock at night in the store?

A. The search warrant was being also executed at that time, which—

Q. Well, isn't it true—

THE COURT: Wait a minute—wait a minute. Let him answer, Mr. Burns.

A. The search warrant at that time was being executed by Detective Cox and the other officers. They were going throughout the store, but nothing was moved or taken at that time that I know or.

Q. Well, now Mr. Ott isn't it quite plain that you, and the State officers, and the Sheriff's Department, and the City Police, were all present in that store from about 4:00 o'clock on, under the authority of this purported search warrant—the initial authority?

A. Mr. Burns, I was not there under the authority of the search warrant. I was there as a Federal investigator. I had nothing to do with that search warrant.

Q. I see, just to see what was going to turn up as the [fol. 144] State boys searched, is that right?

A. No, sir, I was trying—

Q. Well, instead—

THE COURT: Wait just a minute. Let him answer.

A. I was still trying to determine if I, as a Federal officer, had probable cause to believe that a Federal felony was being committed in my presence.

Q. Mr. Ott, tell this Court if all these boxes were stacked up and closed how you could ever determine whether a Federal crime had been committed unless somebody was searching?

A. Well—

Q. And going into those boxes, and identifying them and their value?

A. I relied on the estimate of cost furnished by Central Jobbers Company.

Q. Sir, would you please tell the Court how the boxes were opened—by what authority in that storage room?

A. Each and every box was not opened.

Q. The ones that were, though. You said some were.

A. I didn't open any boxes.

Q. Well, sir, you were inventoring. Tell the Court [fol. 145] who opened them?

A. We inventoried sealed boxes, marked on the outside, and Mr. West was telling me what he said was inside there, and estimated the cost.

Q. You didn't open the boxes?

A. No, sir.

Q. Do you know whether anything was in the boxes or not, other than what Mr. West said?

A. I think that remains to be seen. We still have the boxes that we kept.

Q. Well, you inventoried them, though?

A. Yes, sir.

Q. So, I assume, you had a reason for putting certain items down, is that correct?

A. Yes, sir.

Q. And this reason is what Mr. West told you?

A. Yes, sir.

Q. Now, let's get back to my question— a real simple one: Please tell the Court under what authority those boxes were brought out of the storage room?

A. From the storage room into the store, you mean?

Q. Yes, sir.

A. Under my authority.

Q. What was that authority up until \$5,000.00 was [fol. 146] involved?

A. Only my probable cause.

Q. So you're telling the Court then that the search warrant had nothing to do with it at all?

A. At that point it did not, sir. I had assumed the Federal jurisdiction at that point.

Q. Mr. Ott (sic), I hope I'm not misleading you with the questions, but my first question was by what authority did you and the other officers enter the store at approximately 4:00 o'clock on August 29th?

A. May I separate myself from the State officers at that point?

The State warrant says to the sheriff, or any constable, or marshal of Clay County, Kentucky: Greetings . . . and that's not me, sir.

Q. But you were there inventoring?

A. Yes, sir.

Q. And you were present on the property after closing time?

A. Yes, sir.

Q. And at night.

A. Yes, sir.

Q. And I want to know what authority you had to be there.

A. The store was open to the public when I went [fol. 147] in for the second time, even.

Q. How long did it stay open, Mr. Ott?

A. I would estimate, at least, fifteen to twenty minutes.

Q. While they were clearing the customers out?

A. No, sir.

Q. Are you telling this Judge that that store was not locked and a guard put on both doors to the private part at about 4:15 that evening?

A. I would say, at least, fifteen to twenty minutes after I was in that store there were still customers in that store, and later on they kept trying to get the customers out of the store to close it. By they, I'm referring to the local authorities.

Q. Now, Mr. Ott, I will ask you another simple question: Are you telling this Court that at approximately 4:15 the two public doors to that store were not locked by the authority of badges, and side arms, and the public kept out, and Mr. Knuckles kept in?

A. I really rather not be held to the time element, but I'd say that fifteen or twenty minutes after I entered that store it was still open to the public, and then the officers were trying to get customers out, and then they finally did close the store around, at least, fifteen to twenty minutes after the search warrant was read to

[fol. 148] Mr. Knuckles.

Q. Well, maybe you didn't see the guards on the doors. Did you or didn't you?

A. I was in that store, sir.

Q. Did you see the guards on the doors?

A. At that time I saw officers in the store, yes, sir.

Q. Are you telling the Court that this door stayed open until 9:00 o'clock to the public?

A. No, sir.

Q. Just as soon as they could get them out they closed, and you didn't know what authority they closed the store with?

A. No, sir.

Q. You heard Detective Cox reading that search warrant to Mr. Knuckles, didn't you, Agent Ott?

A. I did.

Q. Didn't you assume then that that was the authority by which the store was closed as an investigating officer?

A. I didn't assume anything there, Mr. Burns.

Q. You assumed that you could just go in and inventory and have stuff carried out of the back room into the front, is that correct?

A. No.

[fol. 149] MR. COOK: Your Honor, I object. I think he is now argueing with the witness.

THE COURT: The objection is sustained.

MR. BURNS: If Your Honor please, he is a hostile witness.

A. I'll try not to be.

THE COURT: The objection is sustained. Go ahead.

Q. Tell the Court by what authority you were there inventoring goods?

A. As a Federal officer.

Q. Just because you are a Federal officer, are you telling this Court that you have the authority to go and inventory—

MR. COOK: I object for the same reason, and further that it is repetitious.

THE COURT: The objection is sustained. You've been into that, Mr. Burns. I think I understand what happened so far.

Q. I want you to tell the Court, if you will please, [fol. 150] how much merchandise, please, was taken from the public part of that store?

A. I assume you're referring to other than the merchandise we carried in from the store room, are you not?

Q. From it, of itself, yes sir.

A. I'm sorry, sir, but I cannot estimate that amount.

Q. I believe—

A. All I can remember is when Mr. West was first seen by me he was expansively waving his hands and saying thousands and thousands of dollars worth. I don't recall, as far as the amounts were at that time. In fact, after the search was completed of the sealed boxes—

Q. Mr. Ott—

THE COURT: Wait a minute.

A. After the search was completed of the sealed boxes, Mr. Geller and Mr. West, and Mr. Geller's brother, as I recall, went out into the store area and were intending to take articles of merchandise off of the shelves themselves, and I stopped them. I said: "These items are not being seized under the authority of the Federal intervention into this matter." I said: "If there's any seizure here, it's not for any property that cannot be identified by the Central Jobbers name on boxes, and this is from broken cartons." And, so, I prohibited them from taking anything at that time. I said they had the civil remedy if they wish to have a lawsuit on this, but for the purpose of the Federal law being involved, I was not authorizing any broken merchandise to be carried out.

Q. Agent Ott, if I recall your testimony correctly, and if I didn't, please correct me—the only items seized in the public part of the store were those cartons which were up front which were covered by the curtain that had to be pulled back to see them?

A. Yes, sir.

Q. And you don't know exactly what those were other than you inventoried them as they were taken out?

A. Yes, sir they are all on the inventory.

Q. But you do remember that the first \$5,000.00 worth came from the storage room which was separate from the store?

A. Yes, sir, that's correct.

Q. You also remember that those doors were closed and not open to the public when you were in there as as investigating officer the first time?

A. The first time they were closed, right.

Q. And sometime during the search these doors were opened by someone, and you do not know by whom?

[fol. 152] A. Yes, sir, the second time someone, I don't know who, opened those doors and propped them open. It seems like there was a water cooler there, and it seems like one door was propped up against the water cooler, or something there.

THE COURT: Mr. Allf, were those doors open when you went in there the second time, or were they opened after you got in there, or do you know?

A. I'm sorry, I can't recall. I do know that later while I was in there these doors were opened and propped open, because you could see into the storage area from the storeroom.

THE COURT: You mean, after you had been in there a while the second time you observed they were open, is that what you mean?

A. Yes, sir, but at what point they were opened I can't recall.

THE COURT: All right.

Q. Mr. Ott, would you please tell the Court the approximate time of the seizure of the boxes which were hidden by the curtain in the public part of the store?

[fol. 153] A. I wouldn't know the time, but it was sometime during Sunday, the following day, when we were removing the merchandise from the store and storehouse into the truck, and the truck didn't arrive until Sunday.

Q. I believe you testified to the Court, or before the Court a few moments ago, that this stock would have been easy to remove?

A. Yes, sir, it could be lifted by a person, if that's what you mean.

Q. How long did it take the Gellers, and the agents and officers to remove this property, Agent Ott?

A. It took almost all day Sunday.

Q. And they used a conveyor loader system, did they not?

A. During part of the removal, they did, from the storage area, yes, sir.

Q. So, it would—and how many people approximately were aiding and assisting in the removal of this property?

A. I'd say, at least—to remove the entire contents upstairs and the storage area, there must have been, at least, ten—eight to ten people helping.

Q. And the only exits from any of these storage rooms, or the store, was right on to the town square in Manchester?

[fol. 154] A. I believe there's a rear exit to that storage area, Mr. Burns. I'm not sure of that.

Q. Into the back area?

A. I believe there was a back exit. I'm not sure.

Q. Did you look out the back there, Mr. Ott?

A. I stepped to the rear of the store and saw the doorway, but I did not go inside.

Q. You didn't see that rock cliff out there behind the store?

A. No, sir.

Q. It would have been quite difficult then for anyone to speedily remove this property from those premises, would it have not?

A. What percentage of the merchandise are you referring to, sir?

Q. I'm talking about from twenty percent on up.

A. I would say it would be very difficult to remove more than twenty percent, without a truck of our size.

Q. By what authority did you detain, if you did detain, Mr. Knuckles in his store from the time that you went in as an official investigating officer until Mr. Geller arrived?

[fol. 155] A. I didn't detain Mr. Knuckles at all that day.

Q. You didn't detain him at all?

A. No, sir. I considered it, but I didn't.

Q. Did you ever at any time advise Mr. Knuckles what your capacity was at that time?

A. Yes, sir.

Q. Did you request his permission to remain on his property after closing time?

A. No, sir.

Q. Without a warrant or search warrant?

A. No, sir.

Q. Did you advise him of his right for you not to remain on his property from closing time on?

A. No, sir.

Q. Mr. Ott, the second time you went in this public part of the store about how long was it before you noticed the private store room doors being open?

A. I don't recall when that was. If it was open when I first came in, I really do not recall at that point. I do know, to the best of my memory, that the first time I went in the store I don't think it was open. I remember seeing the doors, because we were looking for the doors, having seen something from the window, with Central Jobbers on it, and so we were trying to determine at [fol. 156] that time if it was actually a storeroom for the Dollar Store. It had said "Muncy's" on top.

Q. You were in that room, though, weren't you?

A. What room?

Q. The storage room. You entered into the storage room?

A. At what point, sir?

Q. The first time you went in. You tell us when.

A. I didn't go into the public area, or the—

Q. The private.

A. —the private area the first time, and some time after Mr. West called Mr. Geller, I did go into the storeroom because they had so many of the officers around there, and Mr. West had told me that the room was full of Central Jobbers boxes.

Q. Based upon your experience as an officer and observation of public businesses of this type, was the storeroom a public place, in your professional opinion?

A. No, sir, that storeroom, to my opinion, probably was a private place.

Q. You did not go in there in any event until after Mr. Geller arrived, did you?

A. No, as I recall, it was before Mr. Geller arrived. I will try to be as candid as I can be about this. I can't [fol. 157] recall the first time I went into the storeroom, but it was after Mr. Geller was called, but before he arrived.

Q. I see. But you did not remove any of the merchandise until he arrived to identify it?

A. Until he brought company records down, yes, sir.

Q. Then it was carried into the public place?

A. The part that we sequestered was, yes, sir.

MR. BURNS: That's all. Thank you, Your Honor.

THE COURT: All right, anything else, Mr. Cook?

MR. COOK: No, Your Honor.

THE COURT: All right, you may step down, Mr. Alf. Call another.

MR. COOK: That's all.

THE COURT: All right, Gentlemen, anything on behalf of the defendant?

MR. BURNS: Excuse me, I have been calling him Mr. Ott, if Your Honor please. It's Mr. Alf.

[fol. 158] **THE COURT:** Anything on behalf of the defendants?

MR. BURNS: Could we have one minute, Your Honor, to discuss it with the defendants?

THE COURT: That's a mighty short discussion. We will take ten minutes.

Mr. Marshal, you may announce a ten minute recess of the Court.

(Reporter's note: Thereupon, further proceedings herein were in recess from 9:20 P.M. until 9:40 P.M. at which time the following proceedings were had.)

THE COURT: Let the record show the defendants are present in person and by counsel as before the recess of the Court, and the United States Attorney is present.

All right, do the defendants care to introduce any evidence?

MR. BURNS: Yes, if Your Honor please, we would like to call State Police Detective Cox.

[fol. 159] **THE COURT:** All right, come around, Mr. Cox.

The witness, **ROBERT COX**, having first duly sworn, testified as follows, on

DIRECT EXAMINATION

BY MR. BURNS:

Q. State your name to the Court, please.

A. Robert Cox.

Q. What official position do you presently hold with the Commonwealth of Kentucky?

A. I'm a Detective with the State Police.

Q. And were you such on August 29th and August 30th, 1970?

A. Yes, sir.

Q. Detective Cox, I will try to make this as short as possible and not duplicate Mr. Ott's testimony and yours—

THE COURT: Mr. Alf, Mr. Burns. I will correct you this time.

MR. BURNS: Yes, Your Honor.

Q. Mr. Alf. I want you to first state to the Court whether or not on August 29th, 1970, at approximately 4:00 o'clock, you entered the Knuckles Dollar Store at [fol. 160] Manchester, Clay County, Kentucky?

A. That's true.

Q. Sir, by what authority at that time and instance did you enter this store?

A. Under a search warrant.

MR. BURNS: I will ask the Clerk to show him Exhibit A and B, please.

(Reporter's note: At this time the exhibits were handed to the witness).

Q. Is the search warrant Exhibit B or Exhibit A?

THE CLERK: Exhibit B.

Q. Sir, would you review that warrant and tell the Court whether or not that's the warrant you entered the store by virtue of?

A. That's correct.

Q. Tell the Court what you did when you first entered the store by the authority of that warrant?

A. Upon entering the store my first thought was to find the owner, or the person in charge. Just as I stepped in, I asked one of the clerks—a lady, I believe if the owner was present. She said that would be Mr. Knuckles who was at that time in his office. She called him down, [fol. 161] and I went over as you enter the store into the left bay, or the left partition of the store, and met Mr. Knuckles. I introduced myself and told him who I was, and I informed him that we had a search warrant, and I read the search warrant to him.

I advised him of his rights at that time verbally, and talked with him there for a few minutes, trying to explain just what was occurring.

The next thought that occurred to me was the fact that there were customers inside the store, the store was in operation and that if the allegations in the search warrant were true, part of the merchandise the customers were looking at, perhaps, buying and carrying out of the store, might belong to this other company. Therefore, at my direction, the store was closed down.

Q. By closing the store down, Detective Cox, am I correct that the manner in which this was done was:

Number 1, the customers were asked to depart from the store?

A. That's correct.

Q. Then after they had been cleared from the building, the doors were locked and a guard, or officer, put on each of the two doors that came into the public store?

A. That's correct.

[fol. 162] Q. And after this had been finally accomplished, and fully accomplished, it was approximately 4:15?

A. On or about fifteen minutes after.

Q. The closing of the store and the securing of the doors?

A. That's correct.

Q. Detective Cox, the first occasion that you were in this store on the morning of August 29th, did you have occasion to go over near the storeroom doors?

A. On the first occasion?

Q. Yes, sir.

A. No, sir, I didn't.

Q. On the first occasion were you there as a business customer, or as an investigating officer?

A. Well, I went there for the purpose of entering into an investigation.

Q. And the second time that you entered into the store was pursuant to the authority of the alleged search warrant?

A. That's correct.

Q. Now, to get the record straight on this point, neither you or Agent Alf were present when the affidavit and search warrant were filled out by the issuing authorities, were you?

A. No, sir, we weren't.

[fol. 163] Q. As Agent Alf testified, you all arrived in town as the other officers arrived with the warrant and headed toward the building, or words to that effect?

A. That's correct.

Q. Neither of you knew anything about the facts surrounding the issuance of this other than what you had heard?

A. Nothing other than what—

Q. The procedural aspects of the issuing of it?

A. No, sir.

Q. Detective Cox, are you telling the Court that your presence in this store, Knuckles Dollar Store, from approximately 4:00 o'clock on up to and the completion

time of this search, was through and by the authority of that alleged search warrant?

A. Up until the time that Agent Allf assumed the responsibility for completion of the actions taken.

Q. I see, and then am I correct in assuming you remained on to assist Agent Allf?

A. Yes, sir, it's part of our job to assist the other agencies that request it.

Q. Sir, was there a return made pursuant to the execution of that search warrant?

A. Yes, sir, there was.

[fol. 164] Q. I will ask you to look at these two documents—would you please look at each of those and tell the Court what they are, please.

A. This appears to be a copy of the inventory made at the time we went in the store.

Q. From reviewing those and looking them over, does it appear to be a true photographic copy of the inventory?

A. Yes, sir, it does.

Q. And it was in two sections, Detective Cox?

A. I believe that it was.

Q. Now, Detective Cox, to the best of your recollection, were those two—or the original of those two photographic sets the return which was attached to the executing search warrant?

A. I can't say as to whether the original was attached to the search warrant or not. There was a copy, I believe.

Q. The original or a copy, and those were the returns pursuant to the search?

A. That's correct.

Q. Would you introduce those as part of your testimony as exhibits, please—

MR. BURNS:—and Mr. Clerk, what will they be identified as?

[fol. 165] THE CLERK: C. & D. if we take the next in order.

THE COURT: All right, call them C. & D.

Q. Let that be known as Group Exhibit, Inventory of seized property returned pursuant to search warrant.

MR. BURNS: It should be the same exhibit.

THE CLERK: It will be Exhibit C. then.

(Reporter's note: The inventory above referred to is filed and made part of the record herein, and will be found as a part of the Clerk's record, marked "Exhibit Number C" for the Defendants).

Q. Detective Cox, tell the Court why you, as a Kentucky State Police Detective, did not arrest Mr. Knuckles the first time you went in his store on the morning of August 29, 1970?

A. I had insufficient grounds.

Q. Tell the Court what, if any, stolen property you saw in the public part of this store, Knuckles' store, the first occasion you were in his store on August 29th?

[fol. 166] **A.** None, of my own personal knowledge.

Q. Detective Cox, isn't it true that even with the search warrant you officers had to await the arrival of Mr. Geller, and with his assistance, and with the assistance of Mr. West, the property was identified and seized?

A. Well, sir, we thought it best that the property be identified with documentary proof.

Q. Well, you all had no way to identify it of your own knowledge, did you?

A. Other than the cartons being sealed with the company's name on them.

Q. And you saw none of these out in the public part of the store, did you?

A. Only—there were a few boxes that had been opened, sitting in the aisle.

Q. Being used for waste boxes?

A. Some of them were, yes, sir.

Q. When you were in the store on the first occasion the storeroom doors were closed. That's to the side room.

A. I can't say, sir. I wasn't in that section of the store.

Q. When you went in with the search warrant and took possession and control of the property, the doors [fol. 167] were closed to the storeroom?

A. I don't know of my own knowledge. I went to the other section of the store to talk with Mr. Knuckles, immediately upon going in.

Q. You don't know who opened the side doors to the storeroom, though, do you?

A. No, sir, I don't.

Q. At no time during your entire search was Mr. Knuckles arrested by either you or Agent Allf, was he?

A. No, sir.

Q. And after the search and seizure had been completed a Federal warrant for his arrest was obtained and served, is that correct?

A. That's correct.

Q. It took quite some time to load and carry that property out of that store, didn't it?

A. Yes, sir, it did.

Q. It just couldn't have been done in a fast manner, could it?

A. Not in a speedy time, no.

Q. When you all went into the storeroom you were not in pursuit of any law violator, were you—physical pursuit?

A. No, sir.

Q. You went into the storeroom under the authority [fol. 168] of the search warrant?

A. I did, yes, sr.

Q. The storeroom was a part of a fixed structure—building, is that correct?

A. That's correct.

Q. A permanent structure?

A. Yes.

Q. Did you, as an officer, have any reason to believe that Mr. Knuckles was going to destroy any of the property?

A. You mean, right at that time?

Q. On the first occasion that you were in the store?

A. On the first occasion?

Q. Yes, sir.

A. No, sir.

Q. And on the second occasion you had no reason to believe it, did you, because you were there with the search warrant?

A. That's correct.

Q. And neither yourself or Agent Allf had received a call to respond to any police emergency in or about that store from anyone, had you?

A. No, sir, not an emergency.

Q. And when Agent Allf assumed control, or charge, [fol. 169] or authority of this search and this seizure, it was a continuation of the search that you had started pursuant to this search warrant, is that correct?

MR. COOK: Object.

THE COURT: Sustained.

Q. Tell the Court by what authority Mr. Allf relieved you of your search?

MR. COOK: Object.

MR. BURNS: Judge, if Your Honor please, this is a hearing to develop the facts.

THE COURT: Well, let me ask you, Mr. Burns, wouldn't that be first asking Detective Cox what was in Mr. Allf's mind at the time he assumed some supervision over the search, and second, wouldn't it call for a legal conclusion?

MR. BURNS: No, sir, I think it—honestly, sir, I think it is a question of fact. If you have an officer under [fol. 170] a search warrant searching and another officer—

THE COURT: How would he know what the other officer was thinking. The objection is sustained.

Q. Tell the Court what Agent Allf said to you when he intervened into this officially?

A. Well, sir, I can't recall a definite point at which this search progressed into Mr. Allf's investigation. You just can't cut it off from one point to the other. I don't know really. It was after—some time after Mr. Geller arrived and the inventory was started in the back room.

Q. And you don't recall him coming up to you and saying I'm intervening now—there's over \$5,000.00—I'm taking over?

A. Not words to that effect. It just sort of flowed into that.

Q. It just flowed into it.

A. Yes.

Q. By what authority did you return on Sunday, the 30th, to this store and storeroom—the same search warrant?

A. No, sir, by that time it had gone into the Federal authorities' hands, and we were assisting them.

MR. BURNS: I see. No further questions.

[fol. 171]

CROSS EXAMINATION

BY MR. COOK:

Q. Mr. Cox, who actually executed the search warrant upon Mr. Knuckles?

A. I did, sir.

Q. And from whom did you receive the search warrant?

A. Trooper Robert Muse.

Q. Who is he?

A. He is a resident of Manchester.

Q. And is he a Kentucky State Police trooper?

A. That's correct.

Q. These lists that have been introduced as Exhibit C, do they consist of an inventory of the property that was seized and removed from the defendant, Knuckles' premises on August 30th?

A. Yes, sir, they do.

Q. When you were there on August 29th did you see Mr. William West?

A. Yes, sir, I did.

Q. And did he at that time, and specifically on the second occasion when you and Mr. Alf were there, identify to you certain property in the public area of the store as being that of his employer, which, according to him, had been stolen from his employer?

[fol. 172] A. Yes, sir.

Q. Generally, what merchandise did he identify to you in that respect?

A. Well, on the display shelves there was what he termed as soft goods, which included clothing, materials

and some shoes he described and said they belonged to him. He stated that the shoes had numbers on them that were distinctive to his company, accounting numbers, and so forth, and that he could positively identify those as belonging to his company.

Q. Did he make any statement in your presence as to the value of the merchandise in the public store area that he could identify as having been stolen from his employer?

A. He did, but I can't remember at what time he made the statement.

Q. What statement did he make in that respect?

A. I remember that he said the items there on the display cases alone would probably run in excess of Ten Thousand Dollars.

Q. For the record, what day of the week was August 29th, 1970?

A. Saturday.

MR. COOK: Thank you. That's all, Your Honor.

[fol. 173]

RE-DIRECT EXAMINATION

BY MR. BURNS:

Q. Detective Cox, the only property seized from this store in the public part were those cartons up front on the shelves which were covered by curtains, is that correct, as Agent Allf has testified?

A. To my knowledge, that's all.

Q. Neither you or Agent Allf was satisfied with Mr. West's alleged proof of ownership of this property by statements, were you?

A. At the time we entered the store under the search warrant?

Q. Yes.

A. No, sir.

Q. And you, as an officer, did not see any personal property—stolen property at that time, from your own knowledge?

A. From my own personal knowledge, no, sir.

MR. BURNS: That's all.

MR. COOK: One more question.

RE-CROSS EXAMINATION

BY MR. COOK:

Q. This property that Mr. Burns has asked you about [fol. 174] being behind these curtains, were these curtains such as any member of the general public in the store could have pulled back and viewed the merchandise?

A. To tell you the truth, sir, I don't remember the curtains up there. I remember the shelves.

MR. COOK: Very well. That's all.

RE-DIRECT EXAMINATION

BY MR. BURNS:

Q. Sir, describe where the shelves were to the Court, please.

A. The shelves that I remember were as you enter the store, on the extreme left-hand side of the store. As you enter the store, up around over the door-way.

Q. Up over the windows—the big window front?

A. Yes, sir.

THE COURT: How high were they from the floor?

A. I would say, approximately seven (7') feet.

THE COURT: Would you need a ladder to get up there?

A. In order to actually touch the boxes, yes, sir.

[fol. 175] THE COURT: Could you see anything in the boxes, or did you look?

A. Yes, sir, at some point I looked. You could see the boxes very well from the floor.

THE COURT: Did you see any labeling on the boxes?

A. I can't recall being able to read any of the labels.

THE COURT: You don't remember whether the curtain was there then or not?

A. No, sir.

THE COURT: All right.

Q. You do not know at what point Agent Alf, or the officer who pulled the curtains back, did pull them back, do you?

A. No, sir. It was sometime after we had been in there a while before I saw the boxes.

Q. Was Agent Allf assisting you while you were making the search under the search warrant?

A. Assisting me?

Q. Yes, sir.

A. Not in any official capacity, no, sir.

[fol. 176] Q. But he was keeping a list of the property, wasn't he?

A. No list was made until after Mr. Geller came.

Q. And he wasn't looking around, or anything?

A. He was around in the public store area there while we were there.

MR. BURNS: All right, that's all. Thank you.

MR. COOK: That's all.

THE COURT: You may step down.

MR. BURNS: Walter E. Woods.

The witness, WALTER E. WOODS, having been first duly sworn, testified as follows, on

DIRECT EXAMINATION

BY MR. BURNS:

Q. State your name, please.

A. Walter E. Woods.

Q. Where do you live or where did you live on August 29th, 1970?

A. Route 3, Manchester, Kentucky.

Q. Do you know the defendant, Clinton Knuckles?

[fol. 177] A. I know Mr. Knuckles.

Q. What, if any, relationship, by blood or marriage, are you to him?

A. Well, his father-in-law is my brother-in-law. He married a niece of mine—by marriage.

Q. Were you in Manchester, Kentucky on August 29th at approximately 4:15 P.M.?

A. Around 4:15 to 4:20, I would say.

Q. I want you to tell the Court what you did from the moment you arrived in Manchester until the time you left?

A. I arrived there, which was a Saturday, on the 29th around 4:15 to 4:20, and there was a lot of commotion going on over in front of the store.

Q. What store?

A. Knuckles Dollar Store, there near the Ben Franklin Five and Ten Cent Store, and by being a past officer, and noticing a lot of women gathered up over there, I was curious about it, so I walked over to Mr. Knuckles' store, and when I got there there was officers on the door, Constable Charlie Byrd was on the door, and I pecked on the door and he let me in, and when I went inside Agent Allf of the FBI and Detective Cox, and I remember Patrolman Sizemore, the City Police Department, and about three state police, Trooper Brashear, Trooper Muse, and another one, [fol. 178] I believe his name is Miracle, and I immediately went back in the store and talked to Mr. Knuckles and asked him what the trouble was, and he told me they had a search warrant there and was going to search his store, and during that discussion with him, why, Detective Cox came back and wanted to talk to him, and Mr. Knuckles told him that he had an attorney, which is Mr. Lester Burns—yourself, and he would like to wait and get in touch with Mr. Burns, and Mr. Cox said: "That's your privilege to do so."

So, they begin to mill around in the store, and I observed the behavior of the officers—there was some seven or eight, or ten, going in and out of the store. The customers—there was no customers when I got there. The store was locked, and I looked and observed that a Mr. West that I met there on that occasion was there in the store also, and I observed several telephone calls made by Mr. Cox, I think, maybe—Mr. Allf maybe made a call or two from Mr. Knuckles' telephone.

And then, a little later on, Lt. Kromer of the Kentucky State Police came in and talked to me soon after he entered the store, and then he and I went and talked to Mr. West. Kromer didn't know what the situation was all about either. So, I went with Detective Kromer and we went over to Mr. Cox where Mr. West was in the second section of the store. That's the general—two sections that's open to the

[fol. 179] public, and Mr. West identified himself at that time to Kromer, and pulled a sheet of paper out of his pocket, showing that a theft had been reported. It appeared to me as a carbon copy that Mr. Cox had there, and Kromer looked at that and asked Mr. West if he was a representative of the company. He said he was.

And, from that, I observed from being in the store on numerous occasions, usually on Saturdays, there's a double door leading into a stock room. That door was shut, which is there by a water cooler.

I still remained in the store for some time and then a Mr. Smith, his father-in-law—Tipp Smith was there then or before that. Anyway, he appeared there in the store, and we talked the matter over and they went in and out and had lunch, made telephone calls, or something of that nature, for some four to five hours, I would say—approximately four hours, at the best I can recall.

• Then a Mr. Keller (sic)—whom I have learned his name is Keller, come in with some files, about, I'd say, approximately 9:00 o'clock that night. This is fast time, now—Eastern Standard Time at that time of the year, and he had some files in his custody, and then Agent Allf and Detective Cox, and some other officers, were there, and some of the officers had left. Detective James L. Yaden arrived there outside the store, as I recall, and I observed also Mr. [fol. 180] West inside the store making an inventory—writing something down. That was before Mr. Keller arrived, and he—Mr. Knuckles—he come out of the store, Mr. West did and he said Gentleman, or spoke to Mr. Knuckles there. He said something to that nature.

Q. Mr. West, while you were there you gained entry by permission of an officer?

A. Right, Charlie Byrd.

Q. About 4:15?

A. Around 4:15 to 4:20.

Q. Have you been for some time familiar with the opening and closing hours of that Dollar Store—Knuckles Dollar Store?

A. Yes, sir.

Q. What time did they usually close on Saturday, Walter?

A. Around 6:00 o'clock, because it is a busy day.

Q. What time do they open and close on Sunday?

A. None whatsoever. They remained closed on Sunday.

Q. And when you were in that store after the officer let you in, the door from the public part into the storage room was closed?

[fol. 181] A. It was, absolutely.

Q. And the public was not in there then—they were out?

A. That's right.

Q. The officers were there?

A. That's right, and no clerks was there when I got there.

MR. BURNS: I believe that's all. You may ask him.

MR. COOK: We have no questions.

THE COURT: You may step down, Mr. Woods.

MR. BURNS: If Your Honor please, we have nothing further.

THE COURT: All right, anything else from the United States, Gentlemen?

MR. COOK: May I have just a moment?

THE COURT: Yes, sir.

MR. COOK: We have nothing.

[fol. 182] THE COURT: All right, Gentlemen, do you want to be heard?

MR. BURNS: If Your Honor please.

THE COURT: All right, the United States has the burden—they have assumed the burden, I will hear from you first, Mr. Burns.

MR. BURNS: If Your Honor please, the defendants respectfully state and contend to the Court that in this case the United States, and the State officers, were required to have a valid search warrant to enter upon the premises and to search this property.

The United States Supreme Court has laid down in a long line of cases, and in *Vale v. Louisiana*, 90 Supreme Court, 1969, a 1970 case which was decided June 22, 1970, the Court stated this in paragraphs 5 and 6 on page 1972:

After dealing with the Louisiana Supreme Court's though, the Supreme Court stated:

"Entirely apart from that point, our past decisions make clear that only in a few specifically established [fol. 183] and well delineated situations . . ." citing *Katz v. United States* . . . "may a warrantless search of a dwelling to stand Constitutional scrutiny even though the authorities have probable cause to conduct it.

The burden rests upon the State to show the existence of such an exceptional situation."

And citing therein *Chimel v. California*; *United States v. Jeffers*, *McDonald*, and so on, and the record before us discloses none.

It is interesting in this case that the Court—the United States Supreme Court announced those well-defined exceptional cases.

It stated:

"There is no suggestion that anyone consented to this search."

If Your Honor please, in our case, there is no suggestion that anyone consented to the search.

"The officers were not responding to an emergency."

If Your Honor please, in this case the officers were not responding to an emergency.

"They were not in hot pursuit of a fleeing felon."

If Your Honor please, in this case they were not in hot pursuit of a fleeing felon.

[fol. 184] "The goods ultimately seized were not in the process of destruction."

If Your Honor please, the goods ultimately seized in this case were not in the process of ultimate destruction, nor was there any fear, based upon the testimony of these officers, that it would be destroyed.

"Nor was it about to be removed from the jurisdiction."

And it cites each of these cases for these exceptions.

If Your Honor please, the testimony of the officers in this hearing tonight shows that these goods were not about to be removed from this jurisdiction.

The United States Supreme Court, after citing these exceptions, stated:

"The officers were able to procure two warrants for the appellant's arrest. They had information that he was residing at the address where they found him. There is thus no reason so far as anything before us appears to suppose that it was impracticable for them to obtain a search warrant, as well." And citing the cases.

"We decline to hold that an arrest on the street can [fol. 185] provide its own exigent circumstance so as to justify a warrantless search of the arrestee's house."

Now, I recognize, if Your Honor please, the case of *United States v. Golden*. It is my contention that the plain view doctrine is not an exception to the rule where a search warrant has to be obtained. It is our contention, if Your Honor please, that the plain view is not a search at all.

Now, in *United States v. Golden*, it is an inspection case. There are several of those inspection cases. *Camaro* is the leading case, as I see it, in the field of inspection.

In these cases the defendants have to agree under some state law to obtain a license, or a Federal law, to engage in business, such as a non-dealer, that they can have their premises searched summarily without a warrant by the proper officers. This is what, on their face, they do, and in the *Golden* case, the Court stated:

"This case involves an inspection of business premises open to the public and a proprietor who made no objection to the inspection."

And, if the Court please, this latter fact is fatal to his claim because in making administrative inspections war-[fol. 186] rants should normally be sought only after it is reviewed.

Now, why is this important to Clinton Knuckles here tonight, if Your Honor please? They state:

"... and a proprietor who made no objection to the inspection."

I submit to you, Judge, Clinton Knuckles had no opportunity, no right to make objection to this inspection, because had he, he would have been violating a State law then and there—the attempt to obstruct justice, or the execution of a legally issued warrant, because, if you please, sir, this warrant was signed by a judicial officer, and was properly filled out upon its face. He had no right to object to this search.

And in *Camaro v. United States*, in the inspection cases, the Court stated:

“Henceforth warrants would be obtained even though they had agreed unless the special circumstances existed . . .” in even that type of case.

Now, the fruit of a poisonous tree, or the fruit of a poisonous, or misinformed Court, rings a dull sound in my ears.

[fol. 187] You talk about probable cause.—Judge, they had probable cause—they took this probable cause—when I say “they” I’m not referring to these two officers that testified here tonight at all, and mean no inference to them—the officers who took this so-called probable cause to the issuing magistrate attempted to pursue the probable cause. It resulted in an illegal search warrant, and an illegal affidavit, and an illegal search and seizure, as Your Honor has held, pursuant to this warrant to that degree.

Now, we come to the point can something which may have been legally done, but which was probably illegally done here, be used as evidence. We respectfully state that it cannot. We respectfully state that *Wongsung v. United States*, 371 U. S. 471 is authority for this.

This *Siverton* case—*Siverton Lumber Company v. United States*, 251 U. S. 385, if Your Honor please, is certain authority for this, and if evidence is secured or discovered as a result of both legal and illegal leads, it is inadmissible. That’s *U. S. v. Paroutian*, 299 F. 2d 486, at 489.

Judge, the testimony has clearly shown to me, and I feel to you, what property was in a public place for

[fol. 188] them to see, assuming they were legally there.

Agent Allf testified that these shelves up front had boxes on them, yes, sir, and that they were seized, but that he pulled the curtain back and those were the only items, sir, that were taken from this store—from this so-called public store, at that time, and those were the only items that have ever been taken from that public store.

Officer Cox testified in this Court that he did not arrest Mr. Knuckles for violating the law because he, as an officer in this place, admittedly where he had a right to be, did not know that any of the property was stolen.

Agent Allf testified the same, if Your Honor please.

Now, this is similar—strikingly similar to me, Your Honor, to the moonshine case, where the agent had a legal warrant to be at this door that was heard in this Court. He knocked on the door, the lady opened the door, he told her his purpose to be there and saw the moonshine—a half gallon or gallon sitting there, but he could not, for certain, know that it was moonshine in those jugs.

There would be no difference in a pair of shoes sitting [fol. 189] on these shelves in a public store. The officer had a right to be there, but he doesn't know it is stolen property.

Also, Judge, if you please, there's \$5,000 allegedly of evidence seized and being sequestered for evidence in this trial, and what is it? That came from the storeroom, carried out, they tied it up and sprayed paint on it. They didn't even put the boxes that they got in the public store in that group. That's the testimony of the officers.

I think the law has, and I think the law will continue to jealously guard the rights of citizens from frivolous searches and seizures, and I think the Court was quite firm in *Chimel Vs. California* when after limiting, and limiting, and limiting, it brought the restrictions on a search right on down.

In this case I regretfully state to the Court that Mr. Mitchell and I were unable to find a Supreme Court case

involving a private business, but we did find, and if there are others, we did not, and we looked diligently, we think, a 1965 case of *United States v. Raidl*, 250 F. Supp. 278, and therein the Court stated, on page 280:

"There is some authority for the proposition that if [fol. 190] the store is open for business then the protection of the Fourth Amendment does not apply. *McWalters v. United States*, 6 F. 2d 224. It is clear from the testimony before the Commissioner upon the Petitioner's motion for dismissal that the store was open for business when the agents commenced their search."

". We do not think, however, that the mere fact the store was open for business is sufficient to open the door to deprivation of otherwise inviolate constitutional rights.

It is true, as the Government contends, that the agents could have been on this premises as business invitees of the Petitioner."

They could have, but admittedly they were not in our case.

"But an invitation to do business is not equivalent to an invitation to ignore the Petitioner's Fourth Amendment rights. Therefore, we cannot accept the Government's contention that they needed no warrant to search the Petitioner's place of business."

If Your Honor please, I believe, personally, that this is awfully close—awfully close to the facts of our case. [fol. 192] Only in this case, they seized the property from a public place.

There comes a time, and this is the time, that I think I should publicly state that I admire and respect the Court and the District Attorney's office for their frankness in the previous rulings. We do want justice. We know we will get justice. We realize also that decisions of this type are hard to make, but we do not make the law, if Your Honor please. We, in our own feeble and humble way, try to follow it. We feel that every known Fourth Amendment right of this defendant has not only been violated, they have been completely and totally denied

from the inception by the acts that this Court has heretofore heard of, and that anything that has been done since then cannot make legal a totally illegal search and seizure.

We respectfully move the Court to suppress the evidence in its entirety against the defendant for the reasons that I have heretofore stated, and I thank you very kindly.

THE COURT: What says the United States?

MR. COOK: May it Please the Court.

[fol. 193] THE COURT: Mr. Cook.

MR. COOK: It is the position of the United States that the search in this case should be sustained, and we are referring to the search that was made by Special Agent Alf of the Federal Bureau of Investigation.

Now, I think his testimony was, as heretofore been stated, very candid and very honest, and very forthright, and I think it is apparent from that testimony that all of the evidence, all of the merchandise that was seized as a result of this search, came from what must be considered as the private area of this store building.

But, we suggest to Your Honor that the search that was made and the seizure of this property from that area of the store building can be sustained on the theory that at the time Mr. Alf made his search of that part of the store building, he had probable cause to believe that a violation of the Federal law, under Title 18, Section 2314 United States Code, was being committed in his presence.

And we further suggest to the Court that at that [fol. 194] time, it being a Saturday afternoon, or evening, or night, August 29, 1970, that that situation presented circumstances where the fruits of this crime, or this contraband, this merchandise, might reasonably have been said in his own mind, or in the mind of anyone, to be in imminent danger of disappearance, or destruction, or removal, by Mr. Knuckles.

Now, it has been testified that it took them all day Sunday to load that merchandise, and we don't deny that, but had Mr. Alf left the premises on Saturday

evening, or Saturday night, and had taken no action, Mr. Knuckles would have had all day Sunday before Mr. Allf might have come back on Monday had he sought a search warrant from the United States Commissioner, and the property could very well have been disposed of and removed at that time.

And, it is our position that those circumstances present the extraordinary situation which permits a search of a premises without a search warrant upon the basis of probable cause.

Now, I think the evidence is very clear as to what happened here. Mr. Allf received certain information by tele-[fol. 195] phone, or otherwise, concerning the fact that certain individuals in Cincinnati, Ohio—and, I believe, two of these defendants had been arrested and had made statements to the effect that they were in the process, or that they had in the past removed stolen merchandise from that area to Knuckles General Dollar Store in Manchester, Kentucky, and if I'm mistaken in that respect, I don't intend to be, but Mr. Allf did receive this hearsay information through the Kentucky State Police, and they, in turn, had gotten it from the Hamilton County Sheriff's Department.

Now, in addition to that, with this information, he and a Detective of the Kentucky State Police went to the store in Manchester, Kentucky and entered the store and looked around in the public area, and they there saw certain items, as I recall the testimony, which in their minds could be identified as some of this property that they had information about possibly was stolen from the Central Jobbers in Cincinnati, Ohio, and they left.

Mr. Allf returned to London, Kentucky and immediately received this phone call to come back to Manchester, which he did, and upon returning to Manchester he went back [fol. 196] into the public area of this store. At that time, according to the testimony, the store was open. I don't recall just when it was closed to the public, but the evidence is certain that it remained open after he was in there for some fifteen to twenty minutes, and at that time he and Detective Cox, I believe it was, of the

Kentucky State Police, were in this store for the second time, and on that occasion Mr. West, according to this testimony, was there present and identified himself to them as an employee of Central Jobbers of Cincinnati, Ohio, and Mr. West informed them that he could identify merchandise in that public area of the store building as having been the property of his employer, and as having been stolen from his employer in Cincinnati, Ohio, and, according to the testimony of Detective Cox, it was the statement to them by Mr. West that the value of this property was between Five and Ten Thousand Dollars.

We submit to the Court that with this information Mr. Allf then had probable cause to believe that a Federal violation was being committed in his presence. Now, he said that at that time he did not completely rely on this information—he still wanted additional proof, but [fol. 197] I don't think that is the test of whether or not probable cause existed. I think Mr. Allf was overly cautious at that time. I think he had probable cause at that time to believe that this crime was being committed in his presence, but I think it is to his credit that he took the action that he did. But, we submit that then he would have been justified in conducting a search of the entire premises.

He did not. He waited until the other person from Cincinnati, Ohio arrived with the evidence—the documentary evidence to positively identify this property as having been stolen and brought down from Cincinnati, Ohio.

But, it is our position that then, with the information that he had, from the Detective Department through the Kentucky State Police, that this statement had been made by these persons who were apprehended in Cincinnati, Ohio about the interstate transportation of this property to this location, and having been there and seen certain property which could be identified as coming from that location, and having been informed by Mr. West that very definitely a considerable amount of the property located in the public area of this building was, in fact, stolen, we say that he then had probable cause, [fol. 198] and it being the time of day that it was, and

being the day of the week that it was, that the circumstances come within this situation which allows a search of premises without a warrant upon the basis of probable cause.

Now, that is the position of the United States. If Your Honor desires to read any authority in this respect, I would cite *Chapman v. United States*, 365 U. S. Page 610; *Jones v. United States*, 357 U. S. 493; *Morrison v. United States*, 262 F. 2d 449; *Johnson v. United States*, 333 U. S. 10; *Smith v. United States*, 254 F. 2d 751, *Certiorari denied* 357 U. S. 937; *United States v. McPhearson*, 299 F. 2d 763, *Certiorari denied* 371 U. S. 963; *United States v. Fare*, 176 F. Supp 571.

That is our position.

MR. BURNS: If Your Honor please.

THE COURT: All right, anything else, Gentlemen?

MR. BURNS: If Your Honor please, shortly. The U. S. Supreme Court in the case of *Nardone v. United States*, 60 Sup. Ct. 266, 308 U. S. 338, and in *Harrison v. United States*, a 1968 case, 392 U. S. 219, we con-[fol. 199] tend held:

"Once the primary illegality has been established as to the evidence and a showing has been made that this illegality *may*" . . . and I stress *may* . . . "may have been the source of the prosecution evidence, the burden is on the Government to establish that the evidence is sufficiently free from the taint of the illegality to be admissible."

If Your Honor please, the testimony clearly shows that the initial presence of all of these officers was brought about by the search warrant. It shows that the search was commenced at 9:00 o'clock and that a Federal Agent was there from 4:00 until about 12:00 when he took over at midnight.

In the case of *United States v. Brennan* 251 F. Supp 99, it was stated:

"Where the initial presence of Government agents on defendant's property was illegal, every subsequent

step in the investigation process was permeated with the taint of illegality and all evidence seized is to be suppressed."

Now, I don't know who they are trying to kid here. They went there, and this agent, to have a Federal [fol. 200] charge, had to seize \$5,000.00 worth of property. He saw this \$5,000.00 worth of property, and how did he see it? The State officers carrying it out under a State search warrant. Now, they would have you believe at this point, when the \$5,000.00 worth of property had been seen, the State search ended and the Federal officer came in on probable cause to make a search upon his own.

Probable cause is a real simple little statement, as the Court stated here—the Supreme Court in *Binegardner v. United States*, 388 U. S. 160:

"Probable cause exists where the facts and circumstances within their, the officers, knowledge . . ." and I stress the officers knowledge, ' ' ' "and of which they had reasonably trustworthy information . . ." and they did not have trustworthy information here, Judge, by their own admissions, they did not believe Mr. West and required the owner of the company to bring the records to back it up.

. . . "when the officers knowledge of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution to believe [fol. 201] that an offense has been or is being committed."

This did not happen in this case. There was no probable cause. If Your Honor please, we move the Court to suppress the evidence in its entirety. Thank you.

THE COURT: All right, Gentlemen.

Mr. Marshal, you may announce a fifteen minute recess of the Court.

(Reporter's note: Thereupon further proceedings herein were in recess for a period of fifteen minutes, after which the following proceedings were had).

THE COURT: All right, Mr. McIlwain is there some motion you wanted to make at this time with reference to the co-defendants, Brown and Smith?

MR. McILWAIN: Yes, Your Honor.

THE COURT: All right.

MR. McILWAIN: I would like to ask—the Court, as I understood Your Honor's ruling on Monday night was [fol. 202] to the effect that on this supplemental motion that Brown and Smith would be excluded. Your opinion was that they didn't have standing to make the motion?

THE COURT: I don't think they have standing to make the motion in either the original motion or the supplemental motion. Of course, my ruling to the original motion was that the search warrant was quashed. My ruling was that as to the supplemental motion, or as to any motion on their behalf, to quash this search and the result thereof, that they don't have standing. They didn't have any possessory interest in either the property that was searched or the property that was allegedly procured by reason of the search.

All right, I will hear you on it if you want to be heard.

MR. McILWAIN: All right. If Your Honor please—

THE COURT: Are you asking the Court to reconsider that ruling, is that it?

MR. McILWAIN: Yes, Your Honor.

[fol. 203] THE COURT: All right.

MR. McILWAIN: I'd like to clarify one point, if I may.

THE COURT: All right.

MR. McILWAIN: It is my understanding that your initial ruling last Thursday was to the effect that the motion to quash and suppress the evidence was granted on behalf of all the defendants, but they would be excluded on the supplemental motion.

THE COURT: I don't think it matters either way, because I think the search warrant was a nullity, and I think the United States concedes that, don't you, Mr. Cook?

MR. COOK: Yes, Your Honor.

THE COURT: You conceded it initially. I think it's just a piece of paper. I don't think it gives anyone standing for anything.

All right, I will hear you at this time.

[fol. 204] MR. McILWAIN: If Your Honor please, I would like to call Your Honor's attention to a standing necessary to make a motion to suppress where there is an illegal search under an illegal warrant, as Your Honor held in this case the search was made under an illegal search warrant, in that it was signed in blank—

THE COURT: What are you reading from there, the Rules?

MR. McILWAIN: Your Honor, I'm reading from a Search and Seizure by Nathan Sobel, Justice of the New York Supreme Court.

THE COURT: All right, let's hear what Judge Sobel has to say.

MR. McILWAIN: Judge Sobel refers in here to standing.

"A standing issue arises when a defendant complains that property unconstitutionally seized from another is proposed to be used against him."

Which is our position in this case—property unconstitutionally seized from Mr. Knuckles.

". . . But such an issue is rare for if that other [fol. 205] is a co-defendant, his motion to suppress will effectively prevent the use of the product seized against any defendant."

It cites McDonald v. United States, 355 U.S. 451, which holds in the last paragraph, if Your Honor please, this:

"Even though we assume without deciding that Washington, who was a guest of McDonald, had no right of privacy when the officers searched McDonald's room illegally without a warrant, we think that a denial of McDonald's motion was error, prejudicial to Washington as well."

THE COURT: Washington was in the room, though, wasn't he?

MR. McILWAIN: That's correct, Your Honor.

THE COURT: All right, go ahead.

MR. McILWAIN: In this case, unlike *Angelo v. U. S.*, the unlawful seizure of the unlawfully seized material were the basis of evidence used against the co-defendants—if the property had been returned to McDonald, it [fol. 206] would not have been available for use at the trial.

"... We can only speculate as to whether other evidence which might have been used against Washington would have been sufficient."

What I understand this decision to say, if Your Honor please, is when the motion to suppress is granted against one defendant, co-defendant, that suppressed evidence cannot be used in any court, and, therefore, in this case it would not have been used against Washington. His presence or absence, or his ownership or possession or his lack of ownership or possession, would have nothing to do with it. If it was suppressed, then it can't be used in any court, either State or Federal, under Rule 41(e), and that is what the Court is saying, the fact that he was a guest means nothing. The fact is, if it was suppressed as to one defendant, therefore, it cannot be used against the other, because if it is suppressed it goes back to the defendant from whom it was taken.

THE COURT: Does it go back if it was contraband?

MR. McILWAIN: It doesn't go back if it is contraband, that's true.

[fol. 207] THE COURT: That's what this is, isn't it?

MR. McILWAIN: Yes, sir, that's right. What they are saying the suppression itself denies its use in a Federal court, or State court.

THE COURT. I don't think it goes that far, Mr. McIlwain.

MR. McILWAIN: Now, then, if Your Honor please, in the Jones case, which was cited again in the Simmons case, and the Simmons case is a recent case, 390 U.S. 877, and the Jones case Your Honor is familiar with, and it states this, If Your Honor please, and I'm reading

again from Judge Sobel's commentary from the Jones case, in the almost exact words that's in the opinion in the Simmons case:

"Reluctance to obey the command of mapp as manifested on the occasion by the finding of no standing. This is in rarer, however, since the Supreme Court put to rest some confusing principles of private property law in Jones v. U.S. Jones establishes two rules. One, that contraband . . . "which is what we are referring to—" . . . where ownership, [fol. 208] or possession, or control convicts." Another, for fruits or instrumentality of crime. We are concerned with the contraband.

The contraband rule is as follows, and it is stated in this opinion, and it is only fair that I pull that out to:

"Where ownership, or possession, or contraband convicts a defendant need only show that it is proposed to use it in evidence against him."

That's this case. Possession will convict these two defendants, and they had to have possession in order to transport.

THE COURT: Yes, but they're not indicted for transporting it—I mean, they are not indicted for possessing it, they are indicted for conspiring to transport it, and for transporting it, but at the time this seizure was made, they had no possession.

MR. McILWAIN: But Judge, they could not have transported it without possessing it.

[fol. 209] THE COURT: Well, that's a very novel proposition, but they had—that's true, but they had no possession at the time this offense is charged.

MR. McILWAIN: I agree with Your Honor, and that's the reason I say that this case holds that they don't have to have possession at the time the unconstitutional search takes place.

THE COURT: As I see it, Mr. McIlwain, they don't have any more standing to question it than I do.

Suppose there had been no question about this search warrant. Suppose the officers just went over there and broke the door down on Mr. Knuckles' store—just broke the door down and carried it out. These men in Cincinnati couldn't question that fact. They had already delivered it, so the allegation is to Mr. Knuckles. They didn't have it in their possession. They may have had some possession of it at one time, but they are indicted charged with conspiring to transport it, and with transporting it in interstate commerce, the property being of the value of more than \$5,000.00, and I just don't see [fol. 210] how they have any more standing to question it than somebody standing down here on the street in London, or I would, or anybody else.

MR. McILWAIN: If Your Honor please, setting aside the question of whether they have a standing to question it, if it is suppressed, as it has been in this case, as to the primary defendant—the co-defendant, then it is suppressed, as I understand the law, and Rule 8, and the Weeks case back in 1914 ruled that way, it cannot be used, period, in any court, State or Federal.

THE COURT: I don't think that's the law.

MR. McILWAIN: I haven't found anything at all to show to the contrary, except that it can't be used.

THE COURT: That's a nice novel argument, but if that be the case, and you and I were indicted jointly charged with transporting some property in interstate commerce, and they go break my door down and find it, are they precluded from using it against you?

MR. McILWAIN: Not, if Your Honor please if you have not filed a motion to suppress.

[fol. 211] THE COURT: Even if I did, and it was sustained.

MR. McILWAIN: I'd say, the motion has been suppressed and the person unconstitutionally searched.

THE COURT: Well, what right of yours has been violated? You don't claim the property. You don't claim the house, or the store. What right of these people has been violated? They were up in Cincinnati.

MR. McILWAIN: That's true, Judge, but the evidence has been ruled illegal and has been barred from use in a Federal or State Court.

THE COURT: It has been—

MR. McILWAIN: It is fruits of a poison search.

THE COURT: The motion to suppress was sustained as to anything obtained under the search warrant, but not as to these defendants. The search is suppressed—the search warrant was a nullity—it was nothing but [fol. 212] then this question come up on the supplemental motion and these defendants, as I see it, have no standing to question that at all.

MR. McILWAIN: As a point of information, Judge, can I ask you this?

THE COURT: Yes, sir.

MR. McILWAIN: The original ruling of the Court, as I understood it, and I would like to be corrected if I'm wrong, was that the motion to suppress originally filed was granted insofar as the evidence taken under the search warrant. That hasn't been changed. Am I correct on that, Your Honor?

THE COURT: Well, this is what the order says—

MR. McILWAIN: Then—

THE COURT: Wait a minute, I want to read you what it says.

"The Court heard counsel for the United States, and being advised, ordered and adjudged that the motion to suppress be and it is sustained to the extent that it seeks [fol. 213] to quash the search warrant."

MR. McILWAIN: It says nothing about suppressing the evidence?

THE COURT: No, sir.

MR. McILWAIN: The motion itself was to quash the search warrant and suppress the evidence.

THE COURT: I know it, but I didn't rule on that.

MR. McILWAIN: You didn't rule on the suppression of the evidence?

THE COURT: No, sir. Of course, the search warrant was a nullity. That is conceded here by the United States, and, of course, there's a number of things that

go into this suppression of the evidence. For instance, the matter that has been heard here tonight. This evidence might not be suppressed because there may have been other grounds for the search, which, I was very careful to say that the search warrant was quashed.

MR. McILWAIN: I remember that very well.

THE COURT: All right.

MR. McILWAIN: You actually, up until now, reserved your ruling as far as the suppression of the evidence is concerned on my original motion? Sir?

THE COURT: Yes, sir.

MR. McILWAIN: All right. I have nothing further, sir.

THE COURT: All right. Now, that's the original order. Now, the order which I have signed today says this:

"Motion to suppress and the supplemental motion to suppress be and they are overruled as to the defendants, Joseph Everette Brown and Thomas Dean Smith."

That's in accordance with my ruling of the 17th, and I have signed that order today.

Now, Gentlemen, the motion for a reconsideration of that order, made orally here in Court by the defendant, Joseph Everette Brown and Thomas Dean Smith, is [fol. 215] hereby overruled.

Now, there is pending the motion of the defendants for an order requiring the plaintiff to identify any and all evidence which plaintiff contends was legally seized from Knuckles Dollar Store on or about August 29th, 1970.

The Court reserved its ruling on that motion. I have heard the evidence in this case, and I think the introduction of evidence here, and the order to be entered by the Court, makes the matter moot, and that motion is overruled.

Now, Gentlemen, does that leave anything pending except the supplemental motion?

The ruling on the motion to suppress and the supplemental motion to suppress as to the defendant, Clinton Knuckles. Isn't that all that is left pending in this case?

MR. BURNS: Yes, sir, as I see it.

THE COURT: What about it, Mr. United States Attorney?

MR. COOK: Yes, Your Honor.

THE COURT: Gentlemen, I have listened to this evidence very carefully here, and I just don't see any way [[fol. 216] to justify the search of the non-public portion of the Knuckles Dollar Store—not that I'm looking for any way to justify it, I'm attempting to decide what the law is in this regard. I have heard you Gentlemen on it, and I have listened to the position of the United States in regard to that matter, and I just don't see how it can be justified.

It is, therefore, the ruling of the Court that as to the defendant, Knuckles, the motion and supplemental motion to suppress are sustained as to any evidence obtained by by city, county, state or federal officers by reason of a search of the non-public portion of the Knuckles Dollar Store in Manchester, Kentucky on August 29 or August 30, 1970.

As to the defendant, Knuckles, said motion and supplemental motion to suppress are further sustained with reference to any evidence obtained by city, county, state or federal officers by reason of a search of the shelf immediately above the store windows in the front of the public portion of said store on August 30, 1970, said shelf being at the time of said search covered by a curtain which prevented an unobstructed view of the objects stored thereon.

[[fol. 217] To all other extents said motion and supplemental motion to suppress are overruled.

All right. Gentlemen, anything else?

MR. BURNS: Nothing further from me, Your Honor.

MR. COOK: We ask that the case be placed on the trial docket, Your Honor.

THE COURT: All right, Gentlemen, how long is it going to take to try this case?

MR. COOK: Sometime—several days.

THE COURT: All right, I'm going to try—I just

don't think at this particular sitting of the Court that we are going to have the time.

MR. COOK: I don't think so.

THE COURT: All right, Gentlemen, I have a civil term commencing here on the 18th of January. I will assign this case for trial on Monday, January 18th, 1971 at 9:00 A.M., or as soon thereafter as same may be reached [fol. 218] in the procedure of the Court.

All right, anything else?

Mr. Marshal, you may announce a recess of the Court until 9:00 o'clock tomorrow morning.

(Reporter's note: This concludes hearings on all motions, and will conclude Volume I).

71-1188

Eastern District of Kentucky
Filed Feb. 16, 1971
Davis T. McGarvey, Clerk, U.S. District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

No. 14,667

January 19-26, 1971

[Filed Mar. 16, 1971]
Carl W. Reuss, clerk

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JOSEPH EVERETTE BROWN, THOMAS DEAN SMITH,
CLINTON KNUCKLES, DEFENDANTS

TRANSCRIPT OF PROCEEDINGS AND EVIDENCE

* * * *

[fol. 70] The witness, RAYMOND HULGIN, having
been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SILER:

Q. 1. State your name, please.

A. Raymond Hulgin.

Q. 2. How do you spell your last name?

A. H-u-l-g-i-n.

Q. 3. Where do you live, Mr. Hulgin?

A. I live in Hamilton County, Cincinnati, Ohio.

Q. 4. What is your position?

[fol. 71] A. I am a Detective with the Hamilton County
Sheriff's Patrol.

Q. 5. How long have you been a law enforcement officer?

A. For eight years.

Q. 6. Did there come a time during August, 1970, when you had an occasion to investigate the case on trial here today?

A. Yes, sir, I did.

Q. 7. And would you tell exactly what you did on or about the 28th day of August, 1970, with regard to this case?

A. On the 28th day of August, 1970, I was on a surveillance on Work Road in Hamilton County, Ohio.

Q. 8. Who was with you?

A. Along with me was Detective David Hoinke of the Hamilton County Sheriff's Patrol, Detective Taylor and Detective Sergeant Body.

Q. 9. And what did you observe, if anything, with regard to Central Jobbers?

A. On the surveillance in the vicinity of the Jobbing Company on Work Road—

THE COURT: Just a minute. I missed the date. What was the date?

[fol. 72] THE WITNESS: August 28, 1970.

THE COURT: All right, go ahead.

A. On the surveillance of the warehouse of Central Jobbing Company on Work Road, at approximately 4:00 P.M. the surveillance began and at 4:03 P.M. I observed the defendant, Joseph E. Brown,—

Q. 10. Would you point out which one he is?

A. The second man from the left, the negro man.

MR. SILER: We ask the record to reflect he indicated the defendant.

THE COURT: Let it so indicate.

Q. 11. All right, go ahead.

A. Mr. Brown was coming from a overhead warehouse door, wheeling a two-wheel cart containing several boxes and he approached a U-Haul van that was parked along side the warehouse building, opened the rear door of this van and placed these boxes inside. He then went back into the warehouse with the empty cart. Shortly thereafter, within a matter of a couple of minutes, I

observed the defendant, Thomas Dean Smith, emerge from the warehouse with a similar cart also containing several boxes.

[fol. 73] Q. 12. Would you point out Thomas Dean Smith, if you see him here today?

A. Thomas Dean Smith is the man on the far side or end of the table there with the glasses on.

MR. SILER: We ask that the record reflect he identified the defendant, Thomas Dean Smith.

THE COURT: Let it so indicate.

Q. 13. Go ahead.

A. Mr. Smith unloaded the cart he was pushing on to the same U-Haul, the same van truck. He then entered into the warehouse. This procedure continued with both of the defendants wheeling boxes from the warehouse to the truck and loading them on the truck and going back to the warehouse for approximately one hour. At approximately 5:00 P.M., they emerged from the warehouse locking the door and entered into this truck. They drove the truck around the warehouse and out a truck gate onto Work Road.

Q. 14. Was any other individuals with them during this period of time?

A. I observed no one else.

Q. 15. Go ahead.

A. The truck emerged from the gate onto Work Road, proceeded East. We had pre-determined we would have to [fol. 74] stop this truck if it did leave the property. Proper communications were made by radio, and the car that I was in along with two other patrol cars did stop the truck approximately 500' east of the gate on Work Road. At this time Mr. Brown was driving the truck. Mr. Smith was in the passenger side of the truck. We asked them to step from the truck and advised them that they were placed under arrest. We advised them of their constitutional rights at this point.

Q. 16. What was done with the truck and the contents at this point?

A. The truck and contents were removed from that location by wrecker that we had requested to come and pick up the truck. It was taken directly to our headquarters.

It was accompanied by another detective who remained with the truck from the time of the arrest until it arrived at our headquarters.

Q. 17. Was Mr. Geller or anyone for the Company ever notified about this later?

A. After the defendants were brought into our headquarters, we did notify Mr. Geller—the Gellers and Mr. West, and we had placed these two men under arrest and asked them—advised them for what reason we placed them under arrest, and told them we would furnish any other information they may need. At the time we also asked them to be present to identify the material on the truck to [fol. 75] determine as to whether or not they owned it.

Q. 18. All right. Did someone come to identify the merchandise in the back of the truck?

A. Yes, that is correct. Mr. Abe Geller responded to our headquarters, at which time the truck was opened. We removed the merchandise, taking an inventory doing so. Mr. Geller advised us the property on the truck did belong to the company.

Q. 19. Did you see a copy of the inventory?

A. We have our own inventory; in other words, an inventory indicating what the carton stated and quantity. Mr. Geller subsequently made an inventory as to cost. I do have a copy of our inventory along with a copy of his.

MR. SILER: I will ask that he be passed what is listed as Defendants' Exhibit No. 1.

(Reporter's Note: At this time there was a short pause while Defendants' Exhibit No. 1, for identification was handed to the witness and he examined same.)

Q. 20. Have you ever seen that or a copy of that inventory before?

A. Yes, that is the copy of one I have.

Q. 21. And that is an inventory of what?

A. That is an inventory of the merchandise that was [fol. 76] contained on the truck as we inventoried it removing it from the truck.

MR. SILER: At this time the United States will move to introduce this, which the defendants have already placed as an exhibit.

MR. McILWAIN: We have no objection, Your, Honor.

THE COURT: All right, let it be filed. What are we going to call it, Defendant's Exhibit No. 1? It is marked for identification by the defendants. All right, let it be so denominated.

THE CLERK: Defendant's Exhibit No. 1, Filed.

Q. 22. Did there come a time thereafter when you had occasion to talk to the defendants, Thomas Dean Smith or Joseph Everette Brown?

A. Yes, sir, there was.

Q. 23. And when was this?

A. Thomas Dean Smith was interviewed at approximately 7:30 P.M. on the evening of August 28, 1970.

Q. 24. And where was he interviewed?

A. He was interviewed in the Detective's headquarters of the Hamilton County Sheriff's Patrol.

[fol. 77] **Q. 25.** And who was there?

A. Present at the interview was Thomas Dean Smith, was myself, Detective Ronald Taylor, and Detective David Hoinke.

Q. 26. Now before you interviewed him, did you advise him of any constitutional rights?

A. Yes, sir, I did.

Q. 27. Tell the jury what rights you did advise him of.

A. I stated: "Mr. Smith, I will advise you of your rights. You have the right to remain silent. Anything you say can be held against you in a Court of law. You have the right to talk to a lawyer and have him present with you while you are being questioned. If you can not afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements. Mr. Smith, do you understand what I have just told you?"

Q. 28. And what was his reply to that?

A. Yes. The answer was, "Yeah."

Q. 29. Did you ever advise him at anytime before that of his rights or other rights or anything?

A. That is correct. He was advised of his rights immediately as he was arrested on Work Road.

Q. 30. And were those rights similar or different from [fol. 78] the ones you just stated?

A. Those rights were essentially the same, with the exception of a few words either way; but it was the same rights.

Q. 31. And then after you advised him of these rights, was he willing to proceed with the interview?

A. Yes, he was.

Q. 32. Now, in this interview, did you advise him of what he was being charged with?

A. Yes, sir, I did.

Q. 33. And what was that at the time?

A. I advised Mr. Smith he was being charged with the offense of grand larceny and receiving and concealing stolen goods, two different charges.

Q. 34. Did you ever mention to him during this interview that there might be any federal charges on it?

A. During the interview, yes. Not at this particular point.

Q. 35. But sometime during the interview?

A. Yes.

Q. 36. Now, did you have occasion during this interview to ask him if he had ever been involved with taking any other merchandise from this store.

MR. BURNS: Objection.

[fol. 79] THE COURT: Approach the Bench, Gentlemen.

(Reporter's Note: The following proceedings were had at the Bench, out of the hearing of the Jury:)

THE COURT: Ordinarily evidence of other offenses would not be admissible, but where it is charged in this case in Count 1 a conspiracy, other acts of this character between June 12, 1970, and August 28, 1970, wouldn't that be admissible?

MR. BURNS: If Your Honor please, yes, sir, but the Court will note the District Attorney did not confine it to any specific date. He said if.

MR. SILER: I will be glad to reduce it to that. I know what his answer is going to be.

MR. BURNS: We object to anything this defendant said, under Bruton versus United States.

THE COURT: On the ground it was made out of the presence of the co-conspirator, is that right?

MR. BURNS: Yes.

[fol. 80] **THE COURT:** Gentlemen, let me ask you this: In Campbell against the United States, 415 F.2d 356, that's been decided by the Sixth Circuit since Bruton,—I think if you will read Campbell, which is a Sixth Circuit Case, and I have it here—the Sixth Circuit said the rule laid down in Bruton does not apply in cases of conspiracy. Isn't that what it says, Gentlemen, in sum and substance?

MR. BURNS: Yes, sir, but we pose the question, how do you separate it from the two substantive charges that are not conspiracy charges?

THE COURT: Well, I think, Gentlemen, the only way you can do that would be that I will have to take care of it by admonition or in the instructions or perhaps both. Of course, obviously any statement made by a co-defendant out of the presence of the defendant would not be admissible as to Count 2, would it, Mr. United States Attorney?

MR. SILER: That's correct. We submit that.

THE COURT: You want me to admonish the jury or would you rather I take care of it in the instructions?

[fol. 81] **MR. McILWAIN:** Your Honor, we would object on the additional ground they have not yet shown the conspiracy.

THE COURT: Of course, it is really building a house. You have to build it brick by brick. As I understand it, if they fail to show a conspiracy, I would have to exclude it. I don't know whether I can exclude it at this time in the event—where a claim is made as to a conspiracy, and I believe the Campbell case says it is admissible in case of conspiracy. What do you gentlemen for the United States have to say about that matter?

MR. SILER: You mean—

THE COURT: First as to whether it is admissible at this time.

MR. SILER: Well, as I understand the case, it is discretionary with the Court to admit it subject to the condition the conspiracy is proven later. If the Court does not find that a conspiracy is proven later, he admonishes the jury to disregard it. It has to come out [fol. 82] someplace. You have to start with some witness.

THE COURT: I am inclined to think that's the only way you can enter it, Gentlemen. Now, we get to the point, should I give any admonition about it at this time? Of course, we are going to have to take care of it as to Count 2 in some manner. As I understand the rule as to Count 2, first they have to believe beyond a reasonable doubt that a conspiracy existed, and once they have found that, then they can consider the statements made by a co-conspirator—alleged co-conspirator—out of the presence of the other. As to Count 2, if the statement was made out of the presence of one defendant, it would not be admissible under any set of circumstances. And, of course, that would also be admissible in connection with a motion made at the conclusion of the evidence; but I just wonder if an admonition should be given to them at this time, that it is only to be considered as to Count 1 under the later instructions of the Court.

MR. BURNS: Your Honor please, it is just like building the same house. Once the brick is laid in place, can it be withdrawn?

THE COURT: I understand that, but, of course, this [fol. 83] is the law, Br. Burns.

MR. BURNS: That's right.

THE COURT: I want to attempt to handle it in such a way everybody's right is protected.

MR. BURNS: We move for a severance of Counts 1 and 2 at this point in view of the testimony that is being introduced.

MR. McILWAIN: Where there is a conspiracy, don't you contemplate statements by conspirators in the furtherance of the conspiracy rather than a confession made at a later time after the conspiracy has ended?

THE COURT: I think once they showed conspiracy, that any matter that's relevant would be admissible, assuming all other requirements of competency are met, because this is the way these things are. Gentlemen, I believe that's what the case law requires.

MR. McILWAIN: I do have cases here that state—

THE COURT: Well, let me see what your cases are. [fol. 84] I want to see them.

MR. McILWAIN: Just right here. This is the original proposition I gave.

(Reporter's Note: At this time Mr. McIlwain handed a book to the Court, and there was a short pause while the Court examined the case pointed out.)

THE COURT: The certiorari was denied in the Campbell case, Gentlemen.

MR. SILER: I agree with the general proposition, as I know the law, that it is admitted conditional upon the proof of the conspiracy itself. Then it is all decided as either a conspiracy or not. I think that otherwise we would spin our wheels here for about four days, put this man on and off and put him on again, and I think in the interest of justice that—

THE COURT: Have you got any Sixth Circuit case that says as to the conspiracy count, or a Supreme Court case, the statement of an alleged conspirator is not admissible until the conspiracy has been established by any other evidence?

MR. McILWAIN: I don't really believe we do, Judge. [fol. 85] THE COURT: All right, Gentlemen, what do you want me to do? Do you want me to admonish this jury it is not to consider—it is not to be considered as to this defendant as to Count 2 of the indictment on the ground it is hearsay, as to that count, but if it be developed to their satisfaction during the trial, and made to appear beyond a reasonable doubt the conspiracy existed, it may be considered as to count 1? Do you want an admonition to that effect or do you want me to take care of it in the instructions?

MR. McILWAIN: I think it would be adviseable to admonish them.

THE COURT: Why don't I let the jury go upstairs for about fifteen minutes until we try to thrash out something that doesn't have too many errors in it? If you Gentlemen are requesting the admonition.

MR. McILWAIN: As a matter of fact, Judge, we are moving for a motion for a severance.

THE COURT: Well, that motion is overruled on the ground it is not timely.

[fol. 86] Now, do you want an admonition?

MR. McILWAIN: Well,—

THE COURT: Or do you want me to take care of it in the instructions?

MR. McILWAIN: Take care of it in the instructions, Judge.

MR. BURNS: The reason the motion to sever these two counts is made at this point is due to the testimony of this officer relating to the statement of a co-defendant, which was not made in presence of the other defendant. We had no way to anticipate that the United States would at this time bring this testimony out.

THE COURT: Let the motion be overruled. You gentlemen are not requesting an admonition?

MR. BURNS: No.

THE COURT: I will take care of it in the instructions as best I can, Gentlemen.

I want to impress upon all counsel I don't know how [fol. 87] long this trial is going to take. I am sure I will remember this, but you all help me to remember it on both sides in connection with proposed and requested instructions to be given in conformity with Rule 30 at the conclusion of all the evidence.

(Reporter's Note: This concluded the conference had at the Bench.)

THE COURT: Mrs. Reporter, will you read me back the question, please?

THE REPORTER: (Reading)

Now, did you have occasion during this interview to

ask him if he had ever been involved with taking any other merchandise from this store?

THE COURT: The objection is sustained to the form of that question.

Q. 37. I will change the question this way: Did you ask him if he had ever been involved with taking merchandise from this warehouse on or about June 12, or anytime after that up to the time you arrested him?

THE COURT: Just a minute. In what year?

MR. SILER: 1970.

[fol. 88] THE COURT: All right, go ahead.

A. I never asked the man the question in that way.

Q. 38. Well, did he respond in some way with regard to this?

A. Yes, sir, he did.

Q. 39. And what did he say about taking any merchandise after the 12th of June, on or before the 12th of June, 1970?

MR. BURNS: Your Honor please, we will renew our objection to that question.

THE COURT: The objection is sustained unless it be confined to the period en—or the answer be confined to the period encompassed by the dates set out in the indictment; that is, between June 12, 1970, and continuing to and including August 28, 1970.

Q. 40. Well, this was the 28th or 29th of August when you interviewed him, wasn't it?

A. 28th of August, that is correct.

Q. 41. And what did he say with regard to his participation or no participation on any occasion before between the 12th day of June, 1970, and the 28th day of [fol. 89] August, 1970, from Central Jobbers there in Cincinnati?

A. In relation to that period of time, he stated that on several occasions he has removed some property from this warehouse. He did only specify one particular date, that would have been the 29th of June.

Q. 42. 29th of June. And what sort of vehicle did he say that was used on this prior occasion or the several prior occasions?

A. A U-Haul van truck.

Q. 43. And did he say where he got the U-Haul van truck or who got it?

A. He stated that the U-Haul van truck on most occasions was not rented by himself, but he did know where it came from.

Q. 44. Where did he say the goods were taken from on these prior occasions?

MR. BURNS: Your Honor please, we object to leading and consistently so.

THE COURT: Well, overruled. He said where. It doesn't suggest any answer. If you are leading, the question must suggest an answer. Where is a big area. Overruled. All right, go ahead.

A. Could I have the question again, please?

[fol. 90] MR. SILER: Yes. Would you read the question, please?

THE REPORTER: (Reading) Where did he say the goods were taken from on these prior occasions?

A. The goods were taken from the warehouse of Central Jobbing Company.

Q. 45. And did he say or state where the goods were taken, if anywhere?

A. To a destination.

Q. 46. Where was that?

A. He stated they were taken to Manchester, Kentucky, to Knuckles Discount Store.

Q. 47. And did he state what times during the day that he removed these goods from the warehouse on these previous occasions?

A. He stated it was usually after the warehouse closed, between 4:00 and 6:00 P.M., in that area.

Q. 48. Did he say who, if anyone, accompanied him on these prior occasions?

A. He stated on these prior occasions he was in the company of Joseph E. Brown.

MR. McILWAIN: If Your Honor please, there is an objection on behalf of the defendant, Brown, and there is a [fol. 91.] motion to strike that testimony.

THE COURT: Approach the Bench, Gentlemen.

(Reporter's Note: At this time the following proceedings were had at the Bench, out of the hearing of the Jury:)

THE COURT: The only way I know to do that, Gentlemen, is to sustain your objection insofar as it may relate to Count 2 and sustain your motion to the extent that it relates to Count 2 of the indictment. What do you gentlemen have to say about that? I know you gentlemen for the defense are going to say that a jury can't separate those things, but the law is to the contrary as I understand it, but unless you can show me something difference. If you can, I want to see it. What do you have to say about your position?

MR. McILWAIN: That's our position.

THE COURT: What do you say, Mr. Siler?

MR. SILER: I think you have to admonish them and in the instructions if they request it that it is not admissible as to Count 2.

[fol. 92] **THE COURT:** I am going to rule on the objection now. I think it is well-taken as to Count 2, but not as to Count 1.

(Reporter's Note: This concluded the proceedings had at the Bench.)

THE COURT: The motion is sustained as to Count 2 of the indictment and the objection is sustained insofar as it may relate to count 2 of the indictment. As to Count 2 of the indictment, the statement would be hearsay as to the co-defendant, Brown. The law is otherwise as to Count 1 of the indictment, and I will take care of that in the instructions at the time I instruct the jury. That evidence is not to be considered as against the defendant, Brown, as to Count 2 of the indictment.

All right, any objection to that.

MR. McILWAIN: We object, Your Honor please, to admitting—

THE COURT: Yes, but do you object to what I said?

MR. McILWAIN: No.

THE COURT: All right, go ahead, gentlemen.

[fol. 93] Q. 49. Now, Detective Hulin, would you state whether or not this Joe Brown to which he was referring is the same or a different Joe Brown from the one on trial today?

A. It would be the same Joe Brown.

Q. 50. And did he state on how many of these occasions Joe Brown accompanied him; that is, was it one or more than one, or all of them?

A. He stated between the dates indicated, and the questions as I understand it, this is to be from the 12th of June forward.

Q. 51. Yes.

A. During that period of time, there was one date indicated to me.

Q. 52. And during this date, did Joe Brown go with him?

A. Yes, that is correct.

Q. 53. Did he state that he went on any other occasion for which no date was ever given?

MR. McILWAIN: Objection to that, if Your Honor please, unless it is—

THE COURT: Sustained, unless it be shown it was in the period covered by the indictment; that is, between June 12, 1970 and the 28th day of August, 1970.

[fol. 94] Q. 54. Now, did he state who was there at this Knuckles Store when he arrived with Mr. Brown on this occasion?

A. Yes, he did.

Q. 55. And who was there?

A. He told me a gentleman by the name of Clinton Knuckles and another man by the name of Tipp Smith.

Q. 56. Did he tell you as to whether he or Mr. Brown received any money for this merchandise?

A. Yes, he said that they did receive payment for it.

Q. 57. And what payment did they receive?

A. In relation to the specific date, the one date we are speaking of?

Q. 58. Yes.

A. I—

Q. 59. Did he say anything about the specific date as to how much he got?

A. He stated—I didn't direct my question specifically to that particular date. I did specify various dates in general.

Q. 60. Well, did he say how much he got—how many occasions did he say he went down there, a total?

A. From the date of June 12th, we are speaking, forward?

[fol. 95] Q. 61. Well, we have got a problem here. I am talking about over-all. How many times did he tell you he went down there?

MR. McILWAIN: Objection, if Your Honor please.

THE COURT: Well, sustained unless it be between—

MR. SILER: Your Honor, may we approach the Bench?

THE COURT: Yes, come up, Gentlemen. Come up. Come up.

(Reporter's Note: The following proceedings were had at the Bench, out of the hearing of the Jury:)

THE COURT: Are you trying to show something outside the period of the conspiracy?

MR. SILER: No, I am not trying to show it outside the period. What I am trying—

THE COURT: Are you trying to get the witness to understand what you are relating it to?

MR. SILER: No, I am trying to get the Court and defendants' counsel to understand. This man didn't specify [fol. 96] but one date when he was interviewed, but from all the other evidence we have, including the statements of the F.B.I., it is confined in this period and this is during the time the thing was rented and so forth. He went down there twice and the truck was rented twice.

MR. McILWAIN: He didn't go with him the second time.

MR. SILER: The second time is the 30th. That's when he says he went.

MR. McILWAIN: He went with him on the 29th, the only time he was ever down there.

MR. SILER: His own statement to this man was that he went twice.

THE COURT: I thought he said he went once.

MR. SILER: No, he was specific on the one occasion. He didn't give the date on the other.

THE COURT: What's his answer going to be? Read me the question.

[fol. 97] **THE REPORTER:** (Reading)

I am talking about over-all. How many times did he tell you he went down there?

THE COURT: I think you've got to confine it to the period of the alleged conspiracy, Mr. Siler. If he didn't know what it was during the period of the alleged conspiracy, if he can't tell it—he said he went down there on the 29th. You asked him how much money he got.

MR. SILER: Well, the trouble is, he didn't specify the money he got on the 29th and what he got on the other occasion. He said he got \$2400.00 once and \$2600.00 another time. He just went down twice. He had to get it on one of those occasions.

THE COURT: Was it during this period?

MR. SILER: Yes.

THE COURT: I think you can show that.

MR. SILER: It had to be during this period because he just went twice; one time he gave a date, and he got these two figures of numbers. What I am getting at, [fol. 98] we've got a right to get in one of these figures of numbers.

THE COURT: Have you got other evidence you can show it was during this period?

MR. SILER: We've got this truck rental.

MR. McILWAIN: Mr. Brown rented it by himself.

MR. SILER: I believe we've got an F.B.I. statement. Would Your Honor excuse me?

THE COURT: Yes, go ahead.

(Reporter's Note: There was a short pause while Mr. Siler returned to counsel table and secured a paper.)

MR. SILER: His statement to the F.B.I. is to the effect he wasn't sure of the dates, but he does know one was about the 5th of June, and one was later in June,

around the 30th, he thinks. It says "on or about." We don't have to state specifically.

THE COURT: I don't know that you would, but if it says "on or about," but it would have to be in that rea-
[fol. 99] sonable area. On your statement you think you can make it competent, and you so avow, is that right?

MR. SILER: Yes.

THE COURT: Let the objection be overruled. But don't forget it.

MR. SILER: I won't.

(Reporter's Note: This concluded the proceedings had at the Bench.)

THE COURT: The objection is overruled.

Q. 62. Detective Hulgin, would you state to the Court and the jury how many times the defendant, Thomas Dean Smith, told you that he did go down to the Knuckles Store in Manchester, Kentucky?

A. Two times.

Q. 63. And did he say who accompanied him on both of these occasions?

A. Yes, he did.

Q. 64. And who was that?

A. Mr. Joe Brown.

Q. 65. And,—

[fol. 100] MR. McILWAIN: Your Honor please, without having to continually object to this, may I have a standing objection to this testimony?

THE COURT: Well, I am not a believer in the standing objection. If you are objecting to it, this objection is sustained insofar as it relates to the defendant, Joe Brown, as to the charge contained in Count 2 of the indictment. It would be hearsay in that regard and it is sustained and Members of the Jury, you are not to consider it in any way as evidence against the defendant, Joe Brown, as to the charge contained in Count 2 of the indictment.

All right, go ahead.

Q. 66. Now, did you during this interview ask him how much money was received from the selling of this merchandise to the Knuckles Store?

A. He stated on one occasion they received \$2400.00 and on the other occasion it was \$2600.00.

Q. 67. And did he state as to how that was cut up, as to how much he got and how much Joe Brown got?

A. On either of these occasions, he stated—

MR. McILWAIN: There is an objection to that, if Your Honor please.

[fol. 101] THE COURT: As to the defendant, Joe Brown, Members of the Jury, the objection is sustained, insofar as it relates to Count 2 of the indictment and is not to be considered as evidence against Joe Brown as to Count 2 of the indictment.

All right, go ahead.

Q. 68. Go ahead.

A. He said of that money on one occasion he received \$800.00 and on the other occasion he received \$800.00.

Q. 69. Now, in this interview did he tell you as to how he returned to Cincinnati, if he did return to Cincinnati, on these two occasions?

A. Yes, he stated that he returned in the same U-Haul truck and he went down in.

Q. 70. Did he state whether or not the defendant, Joe Brown, accompanied him on the return trip on these two occasions or not?

A. Yes, he did.

MR. McILWAIN: Object to that, if Your Honor please.

THE COURT: All right. Members of the Jury, you are not to consider that as evidence against the defendant, Joe Brown, insofar as it may relate to Count 2 of the indictment. It is not admissible against the defendant, Joe Brown insofar as Count 2 of the indictment is concerned, and to that extent the objection is sustained.

All right, go ahead, Gentlemen.

Q. 71. Did he relate to you as to where the goods were going which were in the truck on the 28th day of August, 1970, in which he was arrested?

A. Yes, he stated the destination was Knuckles Store—Knuckles Discount Store in Manchester, Kentucky.

Q. 72. And did he state how much he, that is Mr. Smith, was to receive for this merchandise which they were taking on the day you arrested them?

A. I don't believe—you will have to bear with me here. I have it in the statement.

(Reporter's Note: There was a short pause while the witness examined a paper in his possession.)

A. He stated he was expecting maybe \$600.00.

Q. 73. Directing your attention to later on in that interview, did you ask him to be more specific as to when he thought he went to Manchester?

A. Yes, I do recall asking him that.

Q. 74. And do you recall what his answer was?

A. Yes, I do.

Q. 75. What was that?

A. He stated on the 5th of June and on the 29th [fol. 103] of June.

Q. 76. Did he say exactly or about?

A. He said about.

Q. 77. Did he state when you interviewed him on this occasion as to where the U-Haul truck was rented on these times when it was taken to Manchester, Kentucky?

A. Yes, sir, he stated that the truck was rented from a Humble Service Station on Glenway Avenue.

Q. 78. And where is that, what town?

A. That's in Hamilton County, Cincinnati, Ohio.

Q. 79. Did he indicate as to whether anyone had made any kind of a list as to what was being taken on the 28th day of August, 1970?

A. Yes, he did.

Q. 80. And who had this list, did he say?

A. He stated on this particular date that he had the list.

Q. 81. All right. Did you see the list yourself?

A. Yes, I did.

Q. 82. Do you know where that list is now?

A. Yes, I do. I have it.

Q. 83. You have it yourself?

A. Yes.

Q. 84. Did you get it from him that night?

A. That's correct.

[fol. 104] Q. 85. Did he say he made the list up?

A. On this particular occasion he stated that he did write on the list.

Q. 86. Did he write on it on his own or did he do it at the direction of anyone.

MR. McILWAIN: I object to that, if Your Honor please.

THE COURT: Approach the Bench, please Gentlemen.

(Reporter's Note: The following proceedings were had at the Bench, out of the hearing of the Jury:)

THE COURT: Is his answer going to be Brown?

MR. SILER: Yes.

THE COURT: The objection is overruled. I think we have got the same proposition as we have all through it, Gentlemen. All right, overruled.

(Reporter's Note: This concluded the proceedings had at the Bench.)

THE COURT: The objection is overruled.

Q. 87. Do you remember the question?

A. Yes, I do. He said that Joe Brown told him, gave [fol. 105] him an idea as to what items should be placed on the list to be taken.

THE COURT: Members of the Jury, you are not to consider this answer given by the witness as evidence against the defendant, Brown, as to the charge contained in Count 2 of the indictment. As to that count of the indictment, it would be hearsay and it is inadmissible as against the defendant, Brown, as to the charge embraced in Count 2 of the indictment and is not to be considered in regard to that count. The Court will give you appropriate instructions at a later time with reference to the consideration to be given such statement as to Count 1 of the indictment.

All right, go ahead.

Q. 88. Did he state at this time whether or not he had some way of communicating with Mr. Clinton Knuckles?

A. Are you speaking of Mr. Smith?

Q. 89. Yes.

A. He communicated with him verbally as to the times he was here.

Q. 90. Did he say whether anyone had telephoned Mr. Knuckles?

MR. McILWAIN: Now, if Your Honor please, there is an objection to that as being leading.

[fol. 106] THE COURT: Sustained.

Q. 91. Well, let me put it this way: Did he state as to how any communication was made with Mr. Knuckles besides the verbal communication, if any?

A. Yes, he stated that Mr. Brown did communicate with Mr. Knuckles by telephone.

MR. McILWAIN: Objection, Your Honor.

THE COURT: Members of the Jury, you are admonished not to consider this statement for any purpose as against the defendant, Brown as to the charge contained in Count 2 of the indictment. As to that count of the indictment, it would be hearsay as to Brown. Brown was not present and you must not consider it for any purpose as to Count 2.

Go ahead.

Q. 92. Detective Hulgin, did he indicate to you as to how items were selected in the warehouse for loading into the truck?

A. Yes, he did.

Q. 93. What did he say?

A. He stated that Mr. Brown would give him an idea as to what type of items to take.

Q. 94. What sort of items would they take did he say?

[fol. 107] A. He said they would take items that would bring them the best price.

THE COURT: Members of the Jury, don't consider for any purpose any reference made by the defendant,

Smith, as to the defendant, Brown, in connection with the answer just given by this witness as to Count 2 of the indictment. Again, Brown was not present and it would be hearsay as to him, and it would not be admissible as to Count 2 of the indictment.

All right, go ahead.

Q. 95. Now, did the defendant, Smith, on this occasion relate as to whether this was the same procedure; that is, how he was being told on the other occasions he went there or was it a different procedure or did he even relate about it?

A. In relation to what goods would be taken?

Q. 96. In relation to selecting the goods, yes, sir.

A. He stated that on some occasions, Mr. Brown had a list of items to be taken, a written list.

THE COURT: Members of the Jury, don't consider this for any purpose as evidence against the defendant, Brown, as to the charge contained in Count 2 of the indictment.

Q. 97. Now, did you show him any kind of item on [fol. 108] this occasion?

A. Yes, I had a piece of paper, had on it itemized, various articles of soft goods, hard goods, of the type that I was told was stored in the warehouse.

Q. 98. Where did you get the list you showed him?

A. I received this list from Mr. William West, who was the supervisor for the Central Jobbing Company.

MR. SILER: I will ask the Marshal to show that to the witness after defense counsel looks at it.

(Reporter's Note: At this time there was a short pause while a piece of paper was shown to defense counsel and then to the witness, each of whom examined the paper.)

Q. 99. Would you look at that piece of paper and state whether or not you can identify that or something which looks like that or which was a copy of that?

A. This appears to be the same piece of paper that was shown to me by Mr. West.

Q. 100. Is this the same or a different paper from the one which you showed to Mr. Smith on this occasion?

A. This is an—this is not exactly the same piece of paper as I recall.

Q. 101. And do you know in what manner—was it—was the other a copy of this?

A. The other was a Xerox copy of this piece of [fol. 109] paper.

Q. 102. Of that list?

A. Yes, sir.

Q. 103. And can you tell as to whether it was the same list of goods? Do you have a copy of the Xerox copy that you had?

A. Yes, I do have.

(Reporter's Note: There was another short pause in the proceedings while the witness compared the two pieces of paper.)

A. Yes, this is a copy of this piece of paper.

MR. SILER: At this time the United States would like for that blue sheet to be identified as Government's Exhibit Number 1.

THE COURT: All right, let it be marked for identification.

THE CLERK: Government's Exhibit Number 1, marked for identification.

Q. 104. After you showed this particular Xerox list to Mr. Smith, did he state whether or not he could identify that list?

A. Yes, he did.

Q. 105. Did he state who drew the list up?

[fol. 110] A. Yes, he said that Joe Brown—he said it was his handwriting and I asked him if he was sure this was Mr. Brown's handwriting and he stated it was. He said there were check marks on the list that were backwards which he has seen on numerous other pieces of paper written by Mr. Brown.

THE COURT: Members of the Jury, you are not to consider for any purpose this testimony as evidence against the defendant, Joe Brown, insofar as it may relate to the charge contained in Count 2 of the indictment.

Q. 106. And did he state why he attributed those check marks to Joe Brown?

MR. BURNS: Objection.

THE COURT: For the same reason?

MR. BURNS: Yes, sir.

THE COURT: All right, overruled.

A. He said in other words—I asked him, I said, “In other words, the check marks are on here backwards and this familiar to you as being Joe’s handwriting, is that correct,” and he said, “Yes, sir,” pointing to the [fol. 111] piece of paper, “this one.”

Q. 107. And did he state whether Joe Brown was right-handed or left-handed?

A. He said Joe Brown was left-handed.

THE COURT: Members of the Jury, you are not to consider for any purpose the alleged statement made by the defendant, Smith, insofar as it refers to the defendant, Joe Brown, insofar as it may relate to the charge contained in Count 2 of the indictment. Brown was not present at the time and it would be hearsay as to that count.

Q. 108. Now, Detective Hulgin, did he state to you as to when, if anytime, he ever used this particular list before?

A. Yes, he stated that he had seen this list approximately four weeks prior to the date that I was questioning him—four weeks prior to the 28th.

Q. 109. Now, did he state what they did with this particular list?

A. Yes, he stated that the list was shown to him by Mr. Brown so as to give him an idea as to what merchandise to load on the truck.

Q. 110. And did he state what they did with the merchandise?

A. The merchandise was brought to Knuckles Discount [fol. 112] Store, Manchester, Kentucky.

THE COURT: Members of the Jury, you are not to consider for any purpose this statement made by the witness relating to any activities or things done by the defendant, Joe Brown, in regard to this matter insofar as it may relate to Count 2 of the indictment. Again it is hearsay, The defendant, Joe Brown, was not present at

the time, and should not be considered as any evidence against the defendant, Joe Brown, as to any charge contained in Count 2 of the indictment.

Q. 111. Did he state to you on this occasion as to what the figure 2200 was on that particular list that you showed him?

A. He stated the figure 2200 was a figure of \$2200.00. This is the amount of money received for this shipment by them. In other words, speaking of Brown and Smith.

THE COURT: That matter is not to be considered, Members of the Jury, in any manner as evidence as against the defendant, Brown, insofar as it may relate to the charge contained in Count 2 of the indictment.

Q. 112. On this occasion when you interviewed Mr. Smith, the defendant, did he indicate as to whether he [fol. 113] had ever been in Knuckles Discount Store in Manchester?

A. Yes, he stated that he had been there.

Q. 113. And on how many occasions?

A. On two occasions where he delivered merchandise.

Q. 114. On those occasions did he state how much, if any, of the merchandise in Knuckles Discount Store he could recognize as being from Central Jobbers Company?

A. I asked him with reference to the percentage of the stock he observed inside the store that may have belonged to Central Jobbing Company and he stated that seventy-five to maybe eighty-five percent of the stock did belong to Central Jobbing Company.

Q. 115. Did he state to you when he and Joseph Brown first got together about this sort of theft in the warehouse?

MR. BURNS: Objection, on the same grounds.

THE COURT: The objection is sustained insofar as it may relate to the defendant, Joseph Brown, as to the charge embraced within Count 2 of the indictment and any answer given is not to be considered as evidence against the defendant, Joe Brown, as to the charge contained in Count 2 of the indictment.

Q. 116. Go ahead.

A. He stated that it was in June.

[fol. 114] Q. 117. June of—

A. June of 1970. This past June.

Q. 118. And in what way did he say this had taken place?

A. He stated that he was approached by Mr. Brown and was requested or asked—well, he said—his words were, “He asked me one day back in June, this past June, to stand there by the back door, just hemmed and hawed around for awhile and then just came out and told me. He asked me if I would like to make \$500.00,” and that was the first time that he was approached with money or become involved in this.

Q. 119. Did he tell you the total amount of money he received in participating in this?

A. He stated he received approximately, since his involvement, about \$2500.00 himself.

Q. 120. Do you have on you at this time that particular itemized list which you got from Mr. Smith on this occasion?

A. Yes, I do.

Q. 121. Would you produce that, please, and let the Marshal give it to defense counsel?

(Reporter's Note: There was no reply to this question, but the witness gave to the Marshal a slip of paper. The Marshal thereupon presented same to defense counsel, who examined same, and then it was returned to the witness by the Marshal.)

Q. 122. You have there a yellow slip of paper, is that correct?

A. That is correct.

Q. 123. Is that the same list which was given to you by the defendant, Smith, on that occasion of your interview about which you have testified?

A. That is correct. This is the same piece of paper.

Q. 124. Is it in substantially the same condition it was in at the time you received it from the defendant, Smith?

A. It is in the same condition with the exception of the notation “taken from Thomas Dean Smith, August

28, '70" and my initials along with Detective Hoinke's initials on the back.

MR. SILER: At this time the United States moves to introduce that as Government's Exhibit No. 2.

THE COURT: Any objection?

MR. McILWAIN: No, Your Honor.

THE COURT: All right, let it be filed.

[fol. 116] THE CLERK: Government's Exhibit No. 2 filed.

Q. 125. Now, after you—how long did this interview last of Mr. Smith?

A. The interview was started at 7:30 P.M. and was concluded at 8:15 P.M.

Q. 126. After this interview occurred, did you have occasion later that same day or night to interview the defendant, Joseph Everette Brown?

A. Yes, sir, I did.

Q. 127. And where did you interview him?

A. He was interviewed in the Detective Headquarters of the Hamilton County Sheriff's Patrol.

Q. 128. Who was with you at the time he was interviewed?

A. At the time Mr. Brown was interviewed, there was myself and Detective Hoinke was present.

Q. 129. Prior to the time that you interviewed Mr. Brown, did you advise him of any constitutional rights?

A. Yes, sir, I did.

Q. 130. And what constitutional rights did you advise him of?

A. I advised him that he had the right to remain silent, that anything he said may be used against him in a Court of Law, that he had the right to the presence of an attorney, that if he could not afford an attorney, one [fol. 117] would be appointed for him prior to any questioning. He was also advised if he decided to talk with us without exercising these rights, at anytime during the interview, he could stop and request an attorney or stop the interview.

Q. 131. Was he asked or did he indicate whether he understood these rights after you advised him?

A. Yes, he was asked if he understood the rights that was recited to him and he stated that he did. He was then shown a piece of paper which had printed on it essentially the same words and asked to sign this as a waiver, and he did so.

Q. 132. Do you have that waiver with you at this time?

A. Yes, sir, I do.

Q. 133. Would you produce that, please?

A. Yes.

(Reporter's Note: At this time the witness produced the waiver in question. The Marshal handed said document to defense counsel, who examined same, and then it was returned to the witness.)

Q. Is what you have in your hand,—is that the waiver which Mr. Brown signed on the 28th day of August, 1970?

A. Yes, sir, it is.

[fol. 118] MR. SILER: At this time, Your Honor, we would move to introduce that as Government's Exhibit No. 3.

MR. McILWAIN: We object to it as having no probative value, if Your Honor please.

THE COURT: All right, overruled. Let it be filed.

THE CLERK: Government's Exhibit No. 3, filed.

Q. 135. Now, Detective Hulin, after Mr. Brown signed this waiver, did you interview him?

A. Yes, sir, I did.

Q. 136. And did he make any special request as to how the interview was to be conducted?

A. Yes, sir, he stated that he would be willing to talk about the situation; however, he stated that he did not wish to be recorded; nor would he give any written statements; nor did he wish for us to take any notes in reference to the statement he gave orally.

Q. 137. Now, after this occurred, tell what he stated in your interview with him in regard to the matter which is on trial here today.

A. First of all, Mr. Brown was advised of the charges that he was placed under arrest for at this time, the

[fol. 119] charges. He was asked if he understood what the charges meant, and they were explained briefly to him, what he was arrested for.

Q. 138. Is this the same charges you told Mr. Smith of?

A. That's correct. For grand larceny and receiving stolen goods.

Q. 139. Did you advise him later as to the fact he might be charged with any federal crime?

A. I advised him that there was an indication that possibly federal investigation could be conducted in regard to this.

Q. 140. All right, go ahead.

A. After advising Mr. Smith of these facts, I asked him if he has ever been involved in removing any other property from the Central Jobbing Warehouse on any other occasion other than that particular day. His reply was that yes, he had been involved in the past. I asked him if he could specify any particular dates when this may have occurred or any one he may have been in the company with at this time. He indicated to me that you should know. That's approximately his words, "You should know all about it by now." I asked him again if he would care to specify more particularly. He stated, "Yes." He said he didn't recall the exact dates, but that [fol. 120] at least two other occasions he did remove truck loads of merchandise from the warehouse. I asked him where he had taken this merchandise to. He stated he had taken it to Knuckles Discount Store in Manchester, Kentucky.

Q. 141. Did he state who accompanied him on these two occasions?

A. Yes. I asked him, as I have indicated previously, if anyone else had been involved in this with him. He stated that he had rather not talk about anyone else, and I asked him in particular,—I said to him, "Had Thomas Smith been involved with you on any of these previous occasions?" And he indicated that Smith had. I asked him if there was anyone else, and he said he wasn't going to tell me anything about anyone else.

MR. BURNS: Objection as to Smith.

THE COURT: The objection is sustained insofar as it may relate to the defendant, Thomas Dean Smith, as to the charge contained in Count 2 of the indictment. Mr. Smith was not present at the time this alleged statement was made and it would be hearsay as to him. Members of the Jury, you are not to consider it in any way as evidence against the defendant, Thomas Dean Smith, as to the charge contained in Count 2 of the indictment.

All right, go ahead.

[fol. 121] Q. 142. Did the defendant, Joseph Everette Brown, tell—did he indicate to you how these goods were taken to Manchester when he was participating?

A. Yes. He stated that they had been removed in U-Haul trucks.

Q. 143. Did he say, who had rented the U-Haul truck?

A. I don't recall.

Q. 144. And where did he take these goods on these occasions? Did he say that?

A. Yes. He stated the goods were transported to Knuckles Discount Store in Manchester, Kentucky.

Q. 145. Did he relate to you as to how much he had received for these goods which he had taken on these two occasions?

A. No, sir, he did not specify particular amounts of money other than the fact that he did receive money.

Q. 146. Did he state whether or not he had any authority to take these goods from the warehouse?

A. No, he did not indicate that he had any authority to do this.

Q. 147. Now, during this interview, did you have occasion to show him this same list which you showed Mr. Smith or did you not?

A. Which list do you mean, Sir?

Q. 148. The little blue slip here which you had the [fol. 122] Xerox copy of?

A. Yes. Mr. Brown was shown this list. He was asked if he was the person who had written it and his answer, as I recall, was something to the effect: "Well, what do you think?"

Q. 149. Is this the Xerox copy that you are talking about?

A. Yes, that's correct.

Q. 150. Was there anything else which he related to you concerning this particular transaction from June, 1970, and through August 28, 1970?

A. I am sorry. I don't follow that question. Would you ask it again?

Q. 151. Is there anything else which he related to you concerning any of the transactions between June of 1970, and August 28, 1970?

A. Insofar as I can recall, no, sir.

MR. SILER: You may ask him.

CROSS EXAMINATION

BY MR. McILWAIN:

Q. 1. Officer, would you let the United States Marshal have the notes or sheets of paper that you took down on the interview with Smith?

A. Yes, sir.

[fol. 123] Reporter's Note: There was a short pause pause while the witness handed the paper to the Marshal, who thereupon delivered to defense counsel said paper.)

MR. McILWAIN: May I have one minute, Your Honor?

THE COURT: Yes.

Gentlemen, approach the Bench, please.

(Reporter's Note: The following proceedings were had at the Bench, out of the hearing of the Jury.)

THE COURT: It is time for the afternoon recess. What do you think about letting defense counsel examine those notes in the presence of the Clerk during the recess, and in the presence of the United States Attorney if he wants to be present? All of you all do that, and in the meantime, the jury and I will take a recess. You all can quit your examination about five minutes early so

you can take a short recess too. Fifteen minutes will be enough time, won't it?

I know there's no problem about this, but they are Mr. Hulgin's notes and there might be some questions about them in some future proceeding. Let him be there too while you are examining them. I know there's no [fol. 124] problem about it with counsel at the bar, but to preserve the integrity, let Mr. Hulgin be present when you do that.

MR. McILWAIN: We have no objection to that.

(Reporter's Note: This concluded the proceedings had at the Bench.)

THE COURT: Mr. Hulgin, we are going to take a short recess. You may step down until after the recess.

Members of the Jury, during the recess of the Court, you are admonished as heretofore. Don't talk to anyone about this case. Don't allow any person to talk to you or communicate with you in any way about any matter concerning this case. If anyone attempts to talk to you or communicate with you in any way about any matter concerning this case, it is not only a contempt of Court; it is an insult to your intelligence, your integrity and honesty as jurors. You should report the matter to the Court at once and they will be dealt with for contempt. Don't form any opinion as to the guilt or innocence of the defendants, or either of them, until the case is finally submitted to you. Don't discuss the case among yourselves. Don't talk to the parties, the witnesses or the attorneys about any matter whatsoever. Just dismiss this [fol. 125] case from your minds and insulate yourselves in every way from all contact relative to the case until you reassemble here in the jury box after the recess of the Court.

If there is no objection to the admonition, the Marshal may announce a fifteen minute recess of the Court.

(Reporter's Note: At this time Court was in recess for fifteen minutes, after which the following proceedings were had.)

THE COURT: Let the record show the defendants and their counsel are present in the Court Room and the attorney for the United States is present in the Court Room.

Gentlemen, do you waive the calling of the jury?

MR. SILER: The United States does.

THE COURT: Does the defendants waive the calling?

MR. BURNS: Yes.

THE COURT: All right, come around, please, Mr. Hulgin.

(Reporter's Note: At this time the witness Raymond Hulgin, returned to the witness stand, and the following proceedings were had.)

[fol. 126]

CROSS EXAMINATION (Continuation)

BY Mr. McIlwain:

Q. 2. Mr. Hulgin, Thomas Smith told you in that statement that these goods had been taken out of the warehouse over a six year period, didn't he?

A. He stated that's what he believed, yes, sir.

Q. 3. What he believed?

A. Yes, sir.

Q. 4. And he also told you he had told that to Mr. Geller and Mr. West? Mr. Geller being the boss of the company and Mr. West being the supervisor.

A. As I recall he stated that he did tell Mr. West this and he felt that Mr. Geller was aware, but that Mr. West knew.

Q. 5. In other words, he said that Mr. Geller knew about it too, didn't he? He felt Mr. Geller knew about it?

A. Right.

Q. 6. And he said that they had refused to do anything about it? In effect, that's what he said, isn't it?

A. Yes, sir, that's correct.

Q. 7. And he told you also that some of the goods, when you asked him about seeing any goods in the Knuckles Store in Manchester,—he told you that some of the goods that was there had been bought from a Dollar Store over at Huchensville (?) Kentucky, by Mr. Knuckles, didn't he?

A. That's correct.

[fol. 127] Q. 8. In other words, all the stuff that was in the store,—Knuckles' Store at Manchester—that came from the Central—the jobbing company—didn't come as a result of being brought directly from Central Jobbing Company, that Mr. Knuckles had brought it from the Huchensville (?) Dollar Store that Central Jobbing owned, right?

A. No, sir, that is not correct. That is not the way he said it.

Q. 9. What do you think he meant by that?

A. As I recall, it was in relation to the question as to how much goods he had there and he indicated to me what percentage he thought came from Central Jobbing Company. I asked him if he believed that perhaps all the goods there had come from Central Jobbing Company. He stated "No," that Knuckles purchased some of the goods in the store from a company in Huchensville (?), Kentucky. He said that he had to do this because he has—I guess it is a business relationship with a franchise or dealership where he has to buy a certain amount of his goods from the other outlet to maintain his store. He did not indicate to me that this Huchensville (?) outlet was any affiliate of Central Jobbing Company.

Q. 10. All right. When you arrested them in Ohio, you indicated already you charged both Smith and Brown with grand larceny, with receiving stolen goods and receipt of [fol. 128] stolen goods? Three separate charges, true?

A. No, sir, they are charged with two charges; one is grand larceny. The second charge is included in a warrant receiving and concealing stolen goods.

Q. 11. Two separate charges they are charged with up there, right?

A. That is correct.

Q. 12. And after you had—at the time you arrested them, they were in this U-haul, right?

A. Yes, sir, that is correct.

Q. 13. About what size U-Haul would it be? Would it be a three-quarter ton or ton and a half?

A. Sir, I believe it is about a ton and a half truck. I do have the description written here if you will allow me to look at it.

Q. 14. All right, look at it, will you, please?

(Reporter's Note: There was a short pause at this time while the witness examined his notes.)

A. In so far as I can determine here, it is a 16' bed tin type truck. I don't know what the tonnage is.

Q. 15. All right, and they had it pretty well filled with goods, didn't they?

A. Yes, sir, it was.

Q. 16. All right. You brought—after you arrested them and taken them to police headquarters, you had Mr. Geller and Mr. West come down, true?

[fol. 129] A. Mr. Geller responded to our headquarters at this particular time.

Q. 17. Who put the value of \$4230.91 on the contents of that truck on August 28th? Is that Mr. Geller?

A. Yes, sir. Well, now, actual monetary inventory exactly was taken not on that particular night. The inventory as to what was on the truck in regard to quantity and type of merchandise was taken. We were not given an exact figure as to what the goods cost them until they related it to their invoices.

Q. 18. In other words, some time later, before you took the case to the grand jury, they submitted to you a list showing the value of these articles as being \$4230.91. Right?

A. That's correct.

Q. 19. All right. And you have already indicated that truck was full, right?

A. Yes, sir.

Q. 20. All right. Now, Mr. Smith told you when you asked them how they decided what to take to Kentucky on

the two occasions that he went, and he told you they simply picked out items that they thought were worth the most amount of money, right?

A. That is correct.

Q. 21. That they didn't have any prearranged list [fol. 130] from the Knuckles Store—in other words, a shopping list from the Knuckles Store—in Kentucky? That they just simply decided themselves what would bring the most money? Right?

A. That's correct.

Q. 22. That's right, and as a matter of fact, they told you on the—on this truck load of material on August 28th, you learned that most of the items on there were shoes, weren't they? A lot of them were anyway, weren't they?

A. Well, there were shoes on the truck.

Q. 23. A lot of shoes on the truck?

A. There were shoes on the truck. I don't recall the amount of them.

Q. 24. That's right, and about the highest price shoes that they handled in that type of store is about \$2.98, wasn't it?

A. I couldn't answer that question because I don't know.

Q. 25. You don't know offhand?

A. No.

Q. 26. Mr. Martin told you that he was only involved two times except the one time you arrested him there in Cincinnati, and they didn't get across the bridge at that time, did they?

[fol. 131] A. Mr. Smith, you mean?

Q. 27. I mean Mr. Smith.

A. Yes.

Q. 28. And on August 28th they didn't get across the bridge?

A. No, sir, they were arrested in Cincinnati.

Q. 29. That's right. And so that the only two times that Smith was involved was on the 29th of June, true? Isn't that what he told you? You said that was one time in your direct testimony, and June 5.

A. Insofar as coming from Central Jobbing to Man-

chester, he stated he had only traveled that distance to the other destination two times.

Q. 30. Two times. All right. That's right. And he told you on one occasion, he got \$600.00 and on the other occasion, he got \$800.00?

A. Yes, sir.

Q. 31. He told you the truck load of material that was transported across the state lines on the 29th and on June 5th on one occasion brought \$2400.00 and on the other occasion brought \$2600.00, right?

A. Yes, sir.

Q. 32. Now let me ask you this. What does the yellow slip represent? Does that represent the list of items taken on what date?

A. The yellow slip was, as I recall, the items that were [fol. 132] supposed to be loaded on the truck on the 28th of August.

Q. 33. O.K. And that's the list that was made up of the highest priced items they could figure out to take, right?

A. Well, that's true.

Q. 34. And the blue slip represented items that had been loaded on a U-Haul on the 29th? Right?

A. As he told me, he said about four weeks prior to this time. He said about four weeks ago, prior to the 28th.

Q. 35. Yes. And that would be the one time—the last time he went on the trip down to Manchester, right?

A. He didn't indicate to me that was the list of the 29th, particularly.

Q. 36. But he did indicate that the only time he came across the river was on the 29th and on the 5th of June, right?

A. Yes, sir.

Q. 37. O.K. Now, in relation to the statement that you have indicated to the jury that Mr. Brown made to you. You gave him the Miranda warning and he signed it and stated to you, "I don't want to make any statements to you, right? After you had given him the warning?

A. Sir,—No, sir, he did not state he did not want to [fol. 133] give any statements. He stated that any state-

ments that he gave that he did not wish to be recorded, on a recorder, nor did he wish them to be written, nor would he sign any written statement.

Q. 38. And I believe you said he told you he didn't want you to make any notes?

A. Yes, he said he preferred that we did not write anything.

Q. 39. Did you make any notes?

A. Not during the interview, no, sir.

Q. 40. Did you make any afterwards?

A. Yes, sir, I made notes of my own afterwards.

Q. 41. Of the conversation with him?

A. Yes, sir.

Q. 42. Do you have them on you?

A. No, sir.

Q. 43. You don't have them? Where would they be?

A. I don't believe I any longer have those notes.

Q. 44. You don't think you have them any longer?

A. No.

Q. 45. Smith, in his statement, Officer Hulin, said the U-Haul truck that you arrested them in was the same type of U-Haul truck that they had used on the 29th and on June 5th, right?

[fol. 184] A. As I recall, he stated that the type of truck used previous to this was a U-Haul truck, not necessarily of the same type and size, but a U-Haul truck.

Q. 46. Did you check out that Humble Oil station for the date of the 29th and to see what type of truck was rented?

A. No, sir, I never. Detective Hoinke did.

Q. 47. What did he find? Do you know?

A. As I—

Q. 48. Was it the same type truck they had on the 28th?

A. As I recall, it was.

Q. 49. Yeah, that's right, and the one that had been rented on June 5th, that was the same type of U-Haul. It that they had on August 28th, wasn't it?

A. That I don't know, sir.

Q. 50. You don't remember?

A. No, sir, I don't remember.

* * * *

[fol. 135] Detective Hoinke.

The witness, **DAVID HOINKE**, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SILER:

Q. 1. State your name, please.

A. David Hoinke.

Q. 2. Where do you live, Mr. Hoinke?

A. Cincinnati, Ohio.

Q. 3. What is your position?

A. I am a detective with the Hamilton County Sheriff's office.

Q. 4. How long have you been with law enforcement agencies?

A. Approximately six years.

Q. 5. Did you have occasion during August 28, 1970, [fol. 136] to be involved in investigation of this case?

A. I did.

Q. 6. Who were you accompanied by?

A. Detective Hulgins, Hamilton County Sheriff's Office.

Q. 7. Where were you located when you were investigating this matter?

A. We were at an address adjacent to the Central Jobbing Company, directly west of the factory on Work Road.

Q. 8. And were you stationed in any particular place?

A. We were in the backyard of a residence and all over the yard of the residence. The people knew we were there.

Q. 9. How far away were you from the location of the Central Jobbers Company warehouse?

A. Approximately 150 to 200 yards.

Q. 10. Did there come a time there that you saw any activity as far as loading of a truck or anything of this sort?

A. That's correct.

Q. 11. What time of day was it?

A. Approximately five minutes after 4:00.

Q. 12. And what individuals did you see involved in this?

[fol. 137] THE COURT: Just a minute. Do you mean in the morning or in the afternoon?

THE WITNESS: P.M.

THE COURT: All right.

Q. 13. What parties did you see there on that occasion?

A. The two defendants.

Q. 14. And do you know their names?

A. Yes, sir.

Q. 15. What are their names?

A. Thomas Dean Smith and Joseph E. Brown.

Q. 16. Do you see them here today?

A. Yes.

Q. 17. Would you point them out if you see them here today?

A. They are sitting to the right of Mr. Burns.

MR. SILER: All right. We ask that the record reflect that he identified the two defendants.

THE COURT: Which one is which?

THE WITNESS: Directly to Mr. Burns' right is [fol. 138] Mr. Brown, and on the outside is Mr. Smith.

THE COURT: Let it so indicate.

Q. 18. Did there come a time while you were on this surveillance when any photographs were taken?

A. That's correct.

Q. 19. Who took the photographs?

A. I did.

Q. 20. And what did you take the photographs of?

A. The loading operation of the U-Haul truck at Central Jobbers Warehouse.

Q. 21. And what individuals did you photograph?

A. The two defendants.

Q. 22. Do you have those photographs with you at this time?

A. They were in the case folder Detective Hulglin has.

MR. SILER: Mr. Marshal, would you get that folder, please?

(There was short pause in the proceedings while the Marshal left the Court Room and returned with the photographs.)

MR. SILER: Let defense counsel see those photographs.

(Reporter's Note: At this time there was another [fol. 139] short pause while the photographs were handed to defense counsel, who thereupon examined same.)

MR. SILER: I will ask the Marshal to pass to the witness twenty photographs.

(Reporter's Note: The Marshal secured the photographs which defense counsel had been examining and handed them to the witness, who examined same.)

Q. 23. I will ask you, Detective Hoinke, if you can identify any or all of those photographs which have been shown to you?

A. Yes, these are the photographs I took.

Q. 24. And were any of them taken at anyplace besides Central Jobbers Warehouse?

A. Yes, sir, actually in three different locations. Correction, that would be two locations; some of the photographs were taken a week previous to the arrest from the area of the stakeout and some of the photographs were taken at our headquarters of the inventory of the truck.

Q. 25. All right. Do those pictures fairly and reasonably and accurately depict the condition situated either at the time at the warehouse or at the location where the truck was unloaded?

A. Yes, sir.

[fol. 140] Q. 26. And would you—

MR. SILER: At this time I will ask that the Clerk label those for identification purposes Government's Exhibit 4 through 23.

THE COURT: All right, let them be so marked for identification.

THE CLERK: Government's Exhibit 4 through 23 marked for identification.

THE COURT: In the order in which you have them there?

MR. SILER: No particular order.

THE COURT: All right.

(Reporter's Note: At this time there was a short pause in the proceedings while the Clerk marked the Exhibits as hereinabove indicated.

Q. 27. Tell the jury if you can recall, or if you need to, look back at the photographs, of who the parties are that are passing outside the warehouse and in the vicinity of a truck?

A. The photographs indicate the defendants loading [fol. 141] the truck.

Q. 28. Both of them or just one of them?

A. The photographs are taken of each one individually as they were loading the truck during that time.

Q. 29. And are these the two defendants on trial today?

A. That's correct.

Q. 30. And what sort of truck were they loading it in?

A. A rented U-Haul van type truck.

Q. 31. Now was the big semi-tractor-trailer, was it being used on that occasion? The one shown in the pictures.

A. It was in the same spot on all four times that we were on the stakeout.

Q. 32. But they weren't using it on this occasion were they?

A. No.

Q. 33. And these pictures which were taken at the station house with the boxes inside of them, what do they represent?

A. That would represent the merchandise taken from Central Jobbing Warehouse.

Q. 34. Who is the individual who is in those pictures? There is a man here pointing to things. Is he [fol. 142] somebody connected in anyway?

A. That's Mr. Geller of the Company.

MR. SILER: At this time, Your Honor, we move to introduce these as Government's Exhibits 4 through 23.

THE COURT: Any objection?

MR. McILWAIN: No objection.

THE COURT: Let them be filed.

MR. SILER: We ask at this time those be passed among the jury.

THE COURT: All right, let them be passed to the jury.

THE CLERK: Government's Exhibits No. 4 through 23, filed.

THE COURT: No, just start them down, Mr. Marshal. I might suggest, Members of the Jury, if you would—I don't want to rush anybody—if you would hold them so two people can look at one photograph at one time, it will move faster, if you can work it out that way.

[fol. 143] (Reporter's Note: There was a pause in the proceedings while the Jury examined the photographs filed as Government's Exhibit Number 4 through 23.)

THE COURT: All right, are you ready to proceed, Gentlemen?

MR. SILER: You may ask the witness.

THE COURT: All right, you may cross examine.

CROSS EXAMINATION

BY MR. McILWAIN:

Q. 1. Detective Hoinke, were you present when your partner took a statement from Smith?

A. That's correct.

Q. 2. Yeah, and he told you that he was in Kentucky on two times, Manchester, right?

A. That's right. I don't have the statement to refer to specific details.

Q. 3. Yeah, but that's your memory two times that he had been involved, right?

A. Yes.

Q. 4. And he got 5-600 one time and 800 the other?

A. Yes, approximately that.

Q. 5. And he told you also there were several other [fol. 144] people involved in selling and transporting?

A. I would have to refer to the actual transcript of the statement. I don't recall. It is quite lengthy.

Q. 6. You don't remember about that?

A. He mentioned other employees involved previously to his involvement.

Q. 7. That U-Haul truck he had, he had it pretty well filled when you stopped him, didn't he?

A. That's correct.

Q. 8. Yeah. Mr. Geller give you an estimate on the price of the goods on there, didn't he?

A. That's correct.

Q. 9. \$4290.31?

A. I don't remember the exact figure.

Q. 10. Around 4200 right?

A. Approximately.

* * * *

[fol. 159] MR. SILER: Just one further question.

THE COURT: All right.

RE-DIRECT EXAMINATION

BY MR. SILER:

Q. 1. Mr. Schrand, when you rented to the Central Jobbers, how was that paid?

A. One time that I can remember being paid with a check. Other than that, I believe it was all cash.

MR. SILER: That's all.

THE COURT: All right, you may step down.

MR. SILER: Mr. William West.

The witness WILLIAM WEST, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SILER:

Q. 1. State your name, please.

A. William West.

Q. 2. Where do you live, Mr. West?

A. I live in Cincinnati, Ohio.

[fol. 160] Q. 3. What is your position? What is your job?

A. My job, I am supervisor and buyer for the Central Jobbing Company.

Q. 4. How long have you been so employed?

A. Four years.

Q. 5. Where is that firm located?

A. 3670 Work Road.

Q. 6. In what town is that?

A. Cincinnati, Ohio.

Q. 7. Do you know the defendants, Joseph Everette Brown and Thomas Dean Smith?

A. Yes, sir.

Q. 8. Would you point them out in the court room, if you see them?

A. They are sitting right at the table here.

Q. 9. Would you identify them by what they are wearing?

A. Stripped knit shirt and a navy blue jacket.

Q. 10. Who is wearing that?

A. Smith is wearing the stripped shirt and Brown the navy blue jacket.

Q. 11. All right, and where are they sitting in the Court Room?

A. At the table, sitting right at the table right here.
[fol. 161] MR. SILER: We ask that the record reflect that he indicated the two defendants.

THE COURT: Let it so indicate.

Q. 12. And under what circumstances have you known these two defendants before?

A. They worked in our warehouse in Cincinnati.

Q. 13. Mr. West, how long have you worked for Central Jobbers?

A. Four years.

Q. 14. Were you working for them in the same capacity during the summer of 1970?

A. Yes, sir.

Q. 15. Did you ever have occasion to be involved in knowing about the shortages in the inventory of Central Jobbers?

A. Yes, sir.

Q. 16. Did you ever get any clues or anything about any person who might be involved in that during the summer of 1970?

A. Yes, sir.

Q. 17. And when was that?

A. Well, it was several times. There were several different occasions that I got clues that certainly people [fol. 162] was taking merchandise out of our warehouse.

Q. 18. Specifically did you see some kind of a piece of paper come from somewhere?

A. Yes, sir.

Q. 19. Do you recall the date on which this happened, approximately?

A. It was approximately the 18th of August.

Q. 20. What year?

A. 1970.

Q. 21. Where did that event occur?

A. In the back of our warehouse at the desk that we use for the orders.

Q. 22. Was this in Cincinnati?

A. Yes, sir.

Q. 23. And who was there with you?

A. Mr. Joseph Brown.

Q. 24. Is that the defendant here on trial?

A. Yes, sir.

Q. 25. And tell exactly what happened on this occasion.

A. I asked Mr. Brown for some shoe orders out of his pocket and as he pulled the shoe orders out of his back pocket, I was setting in a chair as I am setting now, and as he pulled the shoe orders out of his pocket, there was a green piece of paper fell on the floor. And I had been looking for several months for some way to find out where our merchandise was going; so something clicked [fol. 163] and I put my foot on the paper. I wanted to look at it. After Mr. Brown walked away, I picked it up and put it in my back pocket, which I carried this paper all day; and that evening when I left the warehouse, I took the paper and analyzed what was on it. And on the paper, there was several items or several quantities of several items we carry in our warehouse listed, and by looking at this paper, I knew that the prices that he had extended was like 10% of some items, what it actually cost us. I knew at that time or I recognized the writing because I saw his writing thousands of times.

Q. 26. Whose writing did you recognize?

A. Joseph Brown's.

MR. SILER: I will ask the Clerk to pass him what has been labeled as Government's Exhibit No. 1.

(Reporter's Note: The Clerk handed to the witness Government's Exhibit No. 1, and the witness examined same.)

Q. 27. I will ask you if you can identify that particular piece of paper.

A. Yes, sir, this, is the piece of paper that I found.

Q. 28. And is it in substantially the same condition [fol. 164] it was in at the time you got it from the floor?

A. Yes, sir, it is basically in the same condition. It was just folded. There was no writing on the outside, the way it was folded.

Q. 29. All right. And in whose custody has it been since that time?

A. It has been in my custody.

Q. 30. Who brought it to Court here?

A. I brought it to Court.

Q. 31. And would you look at that list and read off what figure it has at the top there for a total figure?

A. \$2200.00.

Q. 32. And read a couple of the items there and state what figures it gives for those items.

A. All right, for instance, it has got 900 pair of assorted canvas for \$200.00.

Q. 33. And based upon your experience, what does that stand for?

A. The \$200.00 for canvas, 900 pair No. 1, the cheapest thing we have in our warehouse in canvas footwear, we charge out for \$1.00 a pair, and we go up to as high as \$2.40 a pair. So assorted canvas, when I looked at this, I knew that 900 pair, if it was the lowest price in our warehouse had to be \$900.00 at our cost; that's our cost, not retail...

[fol. 165] Q. 34. All right, now, do you know what the market value or retail value of goods which are sent out through Central Jobbers are?

MR. McILWAIN: Objection.

A. Yes, sir, in our Shoe Department, we have—

THE COURT: Just a minute.

The objection is sustained unless you specify as to class of merchandise.

MR. SILER: All right, Sir.

Q. 35. Particularly, are you familiar with the particular part of the merchandise that Central Jobbers sends out or all of the merchandise?

A. I am familiar with all the merchandise we send out because I purchase 95% of it for resale.

Q. 36. And how long have you done this purchasing for Central Jobbing?

A. For the last two years.

Q. 37. In this capacity, do you have occasion to have experience with the retail value or market value of goods which Central Jobbers sends out to the various stores?

A. Yes, Sir, I put the retail price on it.

[fol. 166] Q. 38. You do yourself?

A. Yes, sir.

Q. 39. Now, are you familiar with the retail market value of those canvas shoes?

A. Yes, sir.

Q. 40. What is the retail market value of those canvas shoes?

A. The lowest canvas footwear we have in our warehouse retails for \$1.77 a pair, up to \$2.97.

Q. 41. Looking at that particular list, would you look it over and see if you can, if you are able to, tell what the market value is of all the items listed on that particular list.

MR. BURNS: If Your Honor please, we would like to object to all of this testimony for Mr. Smith as to Count 2.

THE COURT: Well, approach the Bench, Gentlemen.

(Reporter's Note: The following proceedings were had at the Bench, out of the hearing of the Jury:)

THE COURT: I have been thinking about that, and I think that my ruling, as I get to reflecting about it, about that rental contract on that truck.—I have already ruled on that, but any declaration made by a co-defendant out [fol. 167] of the presence of the other defendant is hearsay, and would not be admissible; but here you have a man testifying about certain items that relate to one defendant; I don't know, he may come in about items as related to the other defendant, but there is no statement being made here that either defendant is deprived of—no statement made in a manner that deprives the other defendant of a right of denial or cross examination, or anything of that character, and if the evidence is admissible—of course, it only shows at this point connects Brown with something.

MR. SILER: Mr. Smith in his statement said he had seen that list and that's the one they used for the goods going to Manchester.

THE COURT: I think that's right. I think this gets into a different category when you start dealing with demonstrative evidence as distinguished from statements made by people out of the presence of the other. That is excluded as hearsay; but it goes to the total case unless you gentleman can show me something different.

MR. BURNS: It is our contention that it is written hearsay.

[fol. 168] THE COURT: He did something here but it is a part of the case against all of them—it may be a part of the case. I believe it has been tied up with the other defendant by the other defendant.

The objection is overruled.

(Reporter's Note: This concluded the proceedings had at the Bench.)

THE COURT: The objection is overruled. Go ahead, gentlemen.

Q. 42. Mr. West, are you able to determine the market value of all the goods which are listed on this particular list?

A. Yes, sir.

Q. 43. And what, in your best estimation, is that?

MR. BURNS: Objection.

THE COURT: Overruled.

A. When I first found this paper, I sat down and figured the lowest retail, our lowest—not retail, our lowest cost of these items, what they come into our warehouse for, and it is about \$6400.00.

Q. 44. That's your cost?

[fol. 169.] A. Yes.

Q. 45. What is the market value of those goods?

A. The market value would be somewhere in the neighborhood of \$10,000.00.

Q. 46. Now, after you got this particular blue slip, did you show it to anybody else?

A. Yes, I showed it to Mr. Herman Geller, Mr. Abe Geller, Mr. James Buchanan. We went over the list. We discussed—

Q. 47. Well, without saying what you discussed, did you bring the Hamilton County Police in at this point?

A. Yes, sir, that's the first thing we did after we all saw the paper.

Q. 48. Now, did there come a time around the 28th day of August, or the next day or two after that, when you had occasion to go to Manchester, Kentucky?

A. Yes, sir.

Q. 49. Where were you when you first got word to go to Manchester?

A. I was in Geller's Department Store in Pineville, Kentucky.

THE COURT: All right, Gentlemen, would you approach the Bench, please?

(Reporter's Note: The following proceedings were [fol. 170] had at the Bench, out of the hearing of the Jury:)

THE COURT: I remember this part of this testimony to some extent from the various motions that were made to suppress, and I anticipate it is going to take a while to complete the examination of this witness, isn't it Mr. Siler?

MR. SILER: I sorted all through it. I think we can kind of speed it up, but it might get lengthy.

THE COURT: Well, it is 4:15 and some of the jury has a long way to go. I have a pre-trial conference scheduled for 4:00 o'clock. The legal problems in regard to this matter are rather heavy and I think I had rather approach them with a fresh mind in the morning. I don't think we could go on more than fifteen minutes. and I don't think you could finish by that time. Unless there is some compelling reason to the contrary, I am going to recess until in the morning at 9:00 o'clock and we will resume at that time.

(Reporter's Note: This concluded the proceeding had at the Bench.)

[fol. 171] THE COURT: Mr. West, we are going to recess until in the morning. You may step down from the witness stand at this time. You are excused until tomorrow morning at 9:00 o'clock on the announcement of the Court. You may step down now.

MR. SILER: Your Honor, before we recess, I would like to move for the introduction of that slip at this time as Government's Exhibit No. 1.

THE COURT: Any objection, Gentlemen?

MR. BURNS: The blue one?

MR. SILER: Yes.

MR. BURNS: The Detective introduced the same one.

MR. SILER: It hasn't been introduced. It was just identified.

MR. BURNS: We have no objection.

THE COURT: All right, there being no objection, let it [fol. 172] be filed.

THE CLERK: Government's Exhibit No. 1, filed.

THE COURT: All right, Members of the Jury, we are going to recess until tomorrow morning. During the recess of the Court, you are admonished as heretofore. Don't talk to anyone about this case. Don't allow any person to talk to you or communicate with you in any way about any matter concerning this case. If anyone attempts to talk to you or communicate with you in any way about any matter concerning this case, it is not only a contempt of court; it is an insult to your intelligence, your integrity and honesty as jurors; and you should report the matter to the Court at once and they will be dealt with for contempt. Don't form any opinion as to the guilt or innocence of the defendants, or either of them, until the case is finally submitted to you. Don't discuss the case among yourselves. Don't talk to the parties, the witnesses or the attorneys about any matter whatsoever. Just dismiss this case from your minds. Insulate yourselves in everyway from all contact relative to the case until you reassemble here in the jury box tomorrow morning. I cannot impress upon you too greatly the importance of this admonition, and the necessity for the rigorous observance of it by the jury. [fol. 173] If there should be any newspaper accounts relative to this case, or any news broadcasts relative to the case, either on the radio or the television, don't read the newspapers and don't listen to the news broadcasts insofar as this case is concerned. Just dismiss this case from your minds and be very careful to insulate yourselves in everyway from all outside contact about any matter relative to this case until you reassemble here in the jury box tomorrow morning.

If there is no objection to the admonition, the jury in the jury box may be excused until 9:00 o'clock tomorrow morning. You may go now. It looks like we may have some falling weather. If it turns bad, start in time to get here at 9:00 o'clock, but drive carefully. We will wait on you if you are a little late. Please arrive safely.



All right, you may go now.

This case is recessed until 9:00 o'clock tomorrow morning. The parties and witnesses and attorneys are excused until 9:00 o'clock tomorrow morning if they are not a party to any other matter, and they may leave at this time; however, Court is still in session.

Be back tomorrow morning at 9:00 o'clock.

(Reporter's Note: At this time the case on trial was [fol. 174] in recess until 9:00 A.M. on January 21, 1971, at which time the following proceedings were had:)

THE COURT: Let the record show the defendants and their counsel are present in the Court Room and the attorney for the United States is present in the Court Room. The Clerk will please call the jury in the case on trial.

THE CLERK: Yes, Your Honor.

Mrs. Brown, Mrs. Hall, Mrs. Cole, Mrs. Webb, Mrs. Rose, Mrs. Lyons, Mr. Stanton, Mrs. Ledington, Mrs. Frost, Mrs. Disney, Mrs. Wilburn, Mr. Bingham, Mrs. Watters, Mrs. Owens.

They all answered, Your Honor.

THE COURT: All right, Gentlemen, are you ready to proceed? Is the United States ready?

MR. SILER: Ready.

THE COURT: Are the defendants ready?

MR. McILWAIN: Yes, Your Honor.

THE COURT: All right, let Mr. West come back around. He was on the witness stand when we recessed yesterday.

[fol. 175] The witness, WILLIAM WEST, returned to the witness stand, and his testimony continued as follows:

DIRECT EXAMINATION

BY MR. SILER:

Q. 50. Mr. West, after you received information to go to Manchester, did you do that?

A. Yes, sir.

Q. 51. Do you recall what time you arrived in Manchester?

A. It was about 15 minutes after 10:00 in the morning.

Q. 52. And during that day, did you have occasion to go to the Knuckles Discount Store in Manchester?

A. Yes, sir.

THE COURT: Just one minute, Mr. Siler. Was this on the 28th?

THE WITNESS: It was on Saturday, yeah—the 29th.

THE COURT: The 29th. All right, go ahead.

Q. 53. This is the 29th of August, 1970, is that right?

A. Yes, sir.

Q. 54. Now, was anyone accompanying you at this time?

[fol. 176] A. No, I was alone.

Q. 55. Who was at the Knuckles Discount Store when you arrived there?

A. When I arrived at the Knuckles Discount Store, there was only customers and I saw Mr. Knuckles standing, leaning against the wall on the left side as you walk into the store.

Q. 56. Did you later on see any law enforcement officers there?

A. On the second trip back to Manchester, yes.

Q. 57. Was that on the same day or a different day?

A. Yes, it was the same day.

Q. 58. What time was that? How much later was that?

A. I drove back to Pineville and back—I was in Pineville about fifteen minutes and drove back. I would say it was about 1:00 o'clock in the afternoon on the same day.

Q. 59. What law enforcement officers did you see later on that same day at the Knuckles Store?

A. Well, there was George Allf; there was Bobby Cox. I would say probably ten other I don't know their names.

Q. 60. And in that store, did you see Mr. Clinton Knuckles again?

A. Yes, sir.

[fol. 177] Q. 61. Did you have occasion to go in the storeroom of this store?

A. Yes, sir.

MR. BURNS: Objection.

THE COURT: Overruled.

Q. 62. And what, if anything, did you see in the storeroom?

A. In the storeroom there was several cartons stacked on the floor up about twelve feet—

MR. McILWAIN: If Your Honor please, there is an objection to this testimony and any testimony following concerning the Knuckles Store as a result of a search warrant they went there under.

THE COURT: You are preserving your right in accord with the Court's previous ruling, is that correct?

MR. McILWAIN: Yes.

THE COURT: All right, the objection is overruled. Go ahead. All right, go ahead, Mr. Siler.

Q. 63. Do you know or can you estimate how many [fol. 178.] boxes there were in this back storeroom?

A. I would say there was roughly 350 or 400 cartons.

Q. 64. And did you recognize any labels on any of these cartons?

A. Yes, sir.

Q. 65. And what were those labels?

A. They were labels made out to Central Jobbing Company from several companies that we buy merchandise from.

Q. 66. Now did you have occasion either at that particular time or later on that day to compare these with any invoices which you had brought down?

A. Yes, sir.

Q. 67. And were these invoices kept in the ordinary course of business by the Central Jobbers Company?

A. Yes, sir.

Q. 68. And is it the regular course of business to keep these invoices?

A. Yes, sir.

Q. 69. Then after you compared these invoices to some of the merchandise which you saw in the Knuckles Store on the 29th of August, 1970, how much of this merchandise were you able to identify as belonging to Central Jobbers Company?

A. We hauled out two trailer loads, of the low van type, [fol. 179.] which came to approximately \$65,000.00.

Q. 70. Is this the market value of this or wholesale cost?

A. This is the wholesale cost of this.

Q. 71. What would the market value of this be?

A. The market value would run in excess of \$100,000.00.

Q. 72. Did you have occasion to isolate any of this merchandise taken out of there?

A. Yes, sir, that same night I had Mr. Geller bring invoices from Cincinnati. I matched invoices with each carton. Some of the companies we buy shoes from had an acknowledgment number on the carton which appears on the invoice. I matched several invoices with these cartons plus other ones, for \$6400.00 worth of merchandise which was set aside.

Q. 73. Is this the market value or wholesaler's cost?

A. This is the wholesaler's cost.

Q. 74. And what is the market value of that which you set aside?

A. The merchandise I set aside, I would say it would be approximately \$10,000.00 at retail value.

Q. 75. If you brought all of those goods—that is, those you set aside—into the Court Room, how much space would it occupy?

[fol. 180] A. It would cover 18' by 12' high because I had it in a U-Haul truck when I brought it down some time ago.

Q. 76. All right, and is this still isolated in your warehouse, if you need to use it?

A. Yes, sir, it is initialed by the F.B.I. and set aside.

Q. 77. And do you have any samples of that merchandise here today?

A. Yes, sir, I brought nine or ten cartons in my car.

Q. 78. Now do you have invoices with you for the samples of this merchandise which you did set aside?

A. I have invoices for the total \$6400.00 which was set aside.

Q. 79. And were those the ones you spoke about kept in the ordinary course of business?

A. Yes, sir.

Q. 80. Would you let the Marshal hand those to defense counsel?

A. Yes, sir.

(Reporter's Note: At this time the witness handed to the Marshal some papers which were thereupon handed to defense counsel.)

Q. 81. While they are looking those over, would you check outside to see if those boxes are available and bring [fol. 181] those into the Court Room, please.

(Reporter's Note: At this time the witness left the Court Room, and later returned and under his direction a number of cartons were brought into the Court Room and placed beside the Clerk's desk.)

Q. 82. Now, Mr. West, would you step down to these boxes which have been brought into the Court Room and state if you can identify them?

MR. BURNS: Objection. The integrity and continuity of possession has not been shown.

THE COURT: Come to the Bench, Gentlemen.

(Reporter's Note: The following proceedings were had at the Bench, out of the hearing of the Jury:)

MR. BURNS: If Your Honor please, the former question asked by Mr. Siler was "Have these been in your warehouse and isolated?" The photographs show it is an open warehouse. I don't know what's meant by isolated.

THE COURT: Before they are introduced into evidence, he would have to show the integrity of them, but I think he can ask him if he has ever seen them, where and under what circumstances. The question was "Step down [fol. 182] here and see if you have ever seen them before." The objection is overruled.

(Reporter's Note: This concluded the proceedings had at the Bench.)

THE COURT: The objection is overruled. Go ahead.

A. Yes, sir.

Q. 83. All right, and in what way can you identify those?

A. The labels are Central Jobbing Company, 3670 Work Road, Cincinnati, Ohio; This number right here will match with the invoice. Also I receive an acknowledgment before the invoice is sent in.

Q. 84. Allright. Do you have invoices for those particular boxes with you at this time? Are they in this group?

A. Yes, sir.

Q. 85. Would you pull them out, if you could, and match them up with those?

A. Here's one that matches this box here.

Q. 86. What invoice number is that?

MR. McILWAIN: Objection, if Your Honor please.

THE COURT: Overruled.

[fol. 183] A. This is Invoice Number R-26294, and the number appears on the carton is this number 1046, right here.

Q. 87. All right, and how do you know that is the one for that invoice?

A. This number here also appears on this invoice.

Q. 88. What does the invoice indicate was contained in that shipment?

A. It is little infant tennis oxford.

Q. 89. Where did those come from?

A. From Suave Shoe Company in Hialeah, Florida.

Q. 90. All right, would you set that down for the minute? I guess we better go at one thing at a time.

MR. SILER: At this time the United States moves to introduce that invoice as Government's Exhibit No. 26.

THE COURT: Any objection, Gentlemen?

MR. BURNS: Yes, sir.

THE COURT: All right, approach the Bench. Could I see the invoice?

(Reporter's Note: The following proceedings were had at the Bench, out of the hearing of the Jury:)

[fol. 184] THE COURT: What's the point of your objection?

MR. McILWAIN: It's not the best evidence, Judge, and it's been altered.

MR. BURNS: And it clearly does not show what it's supposed to show. This one shows shadows.

THE COURT: It that the original copy?

MR. SILER: No, sir, Your Honor, we want to put this in as a business record.

THE COURT: Where is the original.

MR. SILER: He didn't bring the original with him.

THE COURT: Is a photocopy admissible?

MR. SILER: I think it is under business records where it is kept in the regular course of business and he can testify as to the records.

THE COURT: The original is the best evidence if it's [fol. 185] in existence.

MR. SILER: He says that's in Cincinnati. I can move the Court for a recess until such time as we can get them down here.

THE COURT: If they are objecting to it, I think the original is the best evidence and I don't think you can put the copy in if the original is in existence and available.

Are you Gentlemen objecting on that ground?

MR. BURNS: Yes.

THE COURT: Well, I think that's what the cases say, Mr. Siler. Of course, I tell you all of these companies get a zealous preoccupation with all their original records. Even the Government of the United States does it. They don't want to bring in an original check. They want to bring a copy, and of course, they get a certified and exemplified copy. Here this may have been admissible if the original had been burned up or something of that character. I think if they are objecting to this, you have to produce the original.

[fol. 186] Now, can you go further with this case at this time, Gentlemen?

MR. SILER: Yes, we can, but we will have to stop at some point.

THE COURT: How much longer is it going to take to complete this case?

MR. SILER: The governments side can be completed by noon except for this.

THE COURT: How long will it take you to get that down here from Cincinnati?

MR. SILER: Well, if they have those isolated, of course, they could have them down here by noon, but it may take some time.

THE COURT: I was thinking about recessing by noon anyway today. I don't think this case could be finished and go to the jury today without staying very late.

(Reporter's Note: At this time there was a discussion off the record by the Court and attorneys for both sides.)

Does that present any problems with you gentlemen [fol. 187] for the defense?

MR. BURNS: It will help me.

THE COURT: Does it present any problem about your availability on Monday or anything?

MR. McILWAIN: It wouldn't do any good for me to state my problems. I have had them all week.

THE COURT: Well, I realize that, Gentlemen. It strikes me that—I think probably we could go ahead with some other facet of it, but if this needs to go in at this point, and I am going to quit at noon anyway, I was thinking about recessing until Monday morning until 9:00 o'clock and we would all start it afresh.

What says the United States about its problems?

MR. SILER: Just from the standpoint of economics. We have a group of witnesses we could get on and off here very quickly.

THE COURT: Do they relate to this particular part? [fol. 188] MR. SILER: No.

THE COURT: Is it something you could go ahead with without regard to this?

MR. SILER: Yes.

THE COURT: All right, Gentlemen, why don't we do that then? I had anticipated quitting around noon if we couldn't finish today anyway. It has been a weary week, I am sure, for all parties and counsel, and we had a number of cases. Let me ask you this:

I want to think about the proposed instructions over the weekend. If you have any instructions to submit,—of course, you don't have to do it until the conclusion of the evidence, under Rule 30, or such earlier time as the Court reasonably directs. Isn't that what Rule 30 says, Gentlemen?

(Reporter's Note: At this time there was a short pause while the Court read Rule 30.)

Yes, but if you anything at this time you feel in position to give the Court, when we recess for the noonhour. If you will give me a carbon copy of what you are going to ask for, not the original, and it is not any formal de-[fol. 189] mand for instruction, Gentlemen. It will just give the Court some idea and I can be thinking about it. Of course, the evidence—requested instructions may not be appropriate as the evidence is finally concluded, but I'd rather think about it over the weekend than think about it over the noon—think about it for a very brief period over noon. I will take that up later though. I wanted to tell you what was on the Court's mind.

The objection to this evidence is sustained at this time.

(Reporter's Note: This concluded the conference had at the Bench.)

MR. SILER: At this time we would like to withdraw this witness subject to recall and call some others.

* * * *

[fol. 274] MR. SILER: William West.

The witness, WILLIAM WEST, having been heretofore sworn, testified as follows:

DIRECT EXAMINATION (Continued)

BY MR. SILER:

Q. 1. Mr. West, when you left off Friday, you were identifying the cartons here in front by certain invoices. Do you have the original invoices with you at this time?

A. Yes, sir.

Q. 2. Would you step down to these Exhibits and see if you can identify these or any of them with original invoices which you have in your possession from Central Jobbers?

MR. BURNS: Your Honor please, we object.

THE COURT: Do you want to be heard, Gentlemen?

[fol. 275] MR. BURNS: Yes, sir.

THE COURT: All right, approach the Bench, please.

(Reporter's Note: The following proceedings were had at the Bench, out of the hearing of the Jury.)

MR. BURNS: The defendants, and each of them, object to any testimony concerning these cartons or any one of them because they were taken and seized pursuant to a search and seizure and the Court in the companion case suppressed the evidence, quashed the search warrant and affidavit. It is our contention that this evidence is inadmissible against these co-defendants.

THE COURT: That's in connection with the same matter presented at the motion?

MR. BURNS: Yes, that is true.

THE COURT: All right, overruler.

(Reporter's Note. This concluded the proceedings had at the Bench.)

Q. 3. Would you go ahead and do that, Mr. West?
[fol. 276] A. Yes, sir.

(Reporter's Note: At this time the witness stepped down from the witness stand and went to the stack of cardboard cartons or boxes stacked in front of the Clerk's desk and the following proceedings were had:)

A. Here's a carton from Shoe Supply, Stock No. 202, a man's loafer, cost \$4.48.

THE COURT: Just a minute, Gentlemen, before you go any further. Will the attorney's approach the Bench, please?

(Reporter's Note: The following proceedings were had at the Bench, out of the hearing of the Jury.)

THE COURT: Gentlemen, I think I had better rule on this motion to strike the testimony of the witnesses Roberts, Gibson, Hyde and Lewis. As I understand it, you are relying on the Wade case and the other cases, Mr. McIlwain?

MR. McILWAIN: Yes.

THE COURT: Well, I note when I look at the Wade case several distinguishing characteristics. One, counsel had been appointed; two, it clearly appeared identification [fol. 277] had been made after the arrest; third, in this matter, the question as to whether the defendants were picked out of an array of photographs, as I recall, was introduced by the defendants on cross-examination. Isn't that right? The United States didn't go into that and having done so, in my opinion, if the Wade case be applicable, the defendants have waived the right because they let the bars down so to speak, and the motion is overruled.

MR. BURNS: It is our contention that when an objection is made to a photo identification, that the affirmative burden then shifts to the United States out of the presence of the jury to show it was properly made, and in the event that they do not do that, the defendant has no other alternative but to go into it.

THE COURT: But you introduced it.

MR. BURNS: Your Honor please, we object and were overruled. We did not have a preliminary hearing.

THE COURT: The United States didn't mention photographs.

[fol. 278] **MR. BURNS:** We objected to the identification, if Your Honor please, for that purpose.

MR. McILWAIN: Judge, might I say, We think it is wrong. We have shown the identification by photographs was after August 28th, the date the record shows they were in custody.

THE COURT: What about the man that says, "Those are the men," and points his finger at them and says,

"They are sitting over there by Mr. Burns, to Mr. Burns' right." Then you went further and asked, "Had you ever seen them before?" Then he said, "I saw them in Court," or something. "Did you ever see any photographs?" You went into the evidence. Suppose it had been inadmissible, what could the Government have done at that point?

MR. McILWAIN: We are harmed unless we show the identifications were from the photographs.

THE COURT: What you are trying to say is because they have seen the photographs put the idea in their minds.

[fol. 279] MR. McILWAIN: Yes.

THE COURT: I don't think that's the law, particularly where you opened it up, and the objection is overruled.

(Reporter's Note: This concluded the proceedings had at the Bench.)

Q. 4. Go ahead, Mr. West.

A. These three cartons here, the number that appears on the carton also shows on the invoices, BB1060 is 30 pair of boy's basketball. The stock number on them is 11014 and 11004. The cost per pair is \$1.20.

Q. 5. Is that manufacturer's cost?

A. This is our cost from the manufacturer. That is correct.

Q. 6. Go ahead.

A. The number on these is UN1046. They are Tennis Oxfords, Stock No. 11095, there is 30 pair per case, cost from the manufacturer is 88¢.

Q. 6. Is that a piece?

A. Yes. For each shoe.

Q. 7. All right.

A. This case is also the same thing. Here's one more thirty pair case, which is all the same thing. On this case, [fol. 280] Style No. 4I110 is patent leather, infants' patent leather, cost \$1.50 per pair, thirty pair in a case. These are from Injection Footwear. All these other invoices are for the balance of the merchandise I had set aside in Cincinnati.

Q. 8. All right, you may take the stand again.

(Reporter's Note. At this time the witness returned to the witness stand.)

MR. McILWAIN: Your Honor please, we are objecting to the last statement of the witness and move to strike it.

THE COURT: Well, are those invoices in evidence, those other invoices, Mr. Siler?

MR. SILER: I beg Your pardon, Your Honor.

THE COURT: Approach the Bench, Gentlemen.

(Reporter's Note: The following proceedings were had at the Bench, out of the hearing of the Jury:)

THE COURT: The witness volunteered the statement, "All these other invoices are for the invoices which—the merchandise which I have set aside in Cincinnati." There was an objection to that and a motion to strike. What do [fol. 281] you have to say about that?

MR. SILER: I think that's admissible. I think it is not practical at all to fill this Court Room full of boxes up to the top of the ceiling to bring in all this merchandise. This is just taken as a sampling. I don't think that we are required to bring in the merchandise.

THE COURT: The question was about his statement that these other invoices refer to the rest of it, and they are not in evidence. He's just got them there in his hand. I think the objection is well-taken at this time. If you want to put those invoices in evidence, I assume you would put them in and then you would say or he would say, "I have checked them against this merchandise."

MR. SILER: I intended to do that.

THE COURT: Well, the objection is sustained.

MR. BURNS: Under the orders of this Court, the Court has continued to today so that this witness could obtain the original invoices. He has introduced an acknowledgment [fol. 282] which is not an invoice at all. It is a thank you for the order. This does not state or show the shipment was received by this Company.

THE COURT: Well, of course, this thing hasn't been filed in evidence, has it?

MR. BURNS: It was used in his testimony and we move the Court to strike this testimony and admonish the Jury not to consider it.

THE COURT: Well, that motion is taken under advisement. If the United States wants to lay the foundation for it,—it may be the only record they have. I don't know.

MR. BURNS: They told the Court Friday they had it.

THE COURT: Well, if they have, they ought to produce them.

MR. SILER: We will have to put testimony on about it.

THE COURT: Well, you will have to show—all right, Gentlemen. That motion is overruled, with leave for you [fol. 283] to renew the motion if they don't develop it by proper evidence.

MR. BURNS: Yes, Your Honor.

(Reporter's Note: This concluded the proceedings had at the Bench.)

Q. 9. Mr. West, would you state what all these slips of paper are that you have set on top of the boxes and testified about?

A. These are basically acknowledgments that you receive before the merchandise is shipped. The same numbers appear on the invoices. I have probably got invoices here that will match the same numbers, if it is necessary. When we pay bills and checks, we staple to these which are kept for our files because the auditors are starting to check our records. I have the actual invoices here possibly if it is needed, but this is the same number, stock numbers. Everything appears on this and also the cartons.

Q. 10. How soon before the invoice comes is the acknowledgment sent?

A. The acknowledgment is sent to notify you that delivery will be made.

Q. 11. Do you have invoices to match these, do you think?

[fol. 284] **A.** Yes, sir.

Q. 12. Would you look in your files there and see if you can pull them out?

A. I don't have any actual invoice on these cartons, but this acknowledgment is— it would be virtually impossible

for us to have this acknowledgment of the number on the cartons if it wasn't shipped us because it went into production to be made for us.

Q. 13. Do you know where the original invoices are?

A. I think the original invoices are—after I got to thinking, I have others, but we had a shortage from Suave Shoe Company, that we got involved. There was about \$1800.00 on the shortage we sent a truck down for and it was about \$1500.00 on another, and we was making claims to Suave Shoe Company for certain merchandise, and making them prove it was signed for. So I think—I thought I had it in the files I brought, but I think Mr. Geller has it in his files where he was filing for shortages.

Q. 14. And where would that be today?

A. Mr. Geller has it in his office probably.

Q. 15. You mean in Cincinnati?

A. Yeah.

Q. 16. When you had those copies here on Friday, were [fol. 285] those copies of this invoice or copies of the acknowledgment?

A. I am not sure. I think it was of the acknowledgment.

Q. 17. Do you have those copies with you today?

A. Yes.

Q. 18. Would you look through there to see if they were copies of the acknowledgment or the invoice?

A. Yes.

THE COURT: Gentlemen, would you approach the Bench, please?

(Reporter's Note: The following proceedings were had at the Bench, out of the hearing of the Jury:)

THE COURT: While he is looking for this, what do you think about us taking a recess and letting him look during the recess?

Now, Gentlemen, we are getting into an area here,—I think you can show something is in the records of a Company if you show whatever record they might have to identify this as being their merchandise if it is and if they have such a record, whatever it might be, if it is kept in the regular course of business, and if these gentlemen

want to see them, and if they have these invoices, they ought [fol. 286] to produce them.

MR. SILER: Your Honor, may I say something?

THE COURT: Yes.

MR. SILER: It is the contention of the United States there is nothing special about the invoices.

THE COURT: I say—I don't say there is any magic in the invoices.

MR. McILWAIN: That's true.

THE COURT: But what they should show—they should show whatever record they have that will identify it. I just can't understand why in a case of this magnitude they wouldn't produce every record they had. Every company has a phobia about their records. Of course, that is the trouble with the country now; everybody is keeping too much paper. Good paper is material in connection with these cases.

All right, I am going to take a recess and let him look during the recess and see what he has there.

(Reporter's Note: This concluded the proceedings [fol. 287] had at the Bench.)

THE COURT: Mr. West, you may step down until after the recess of the Court.

Members of the Jury, we are going to take short recess, while they are looking for these records. We will take a rest while they are looking for these records, if there are any, whatever record they are looking for.

During the recess of the Court, you are admonished as heretofore. Don't talk to anyone about this case. Don't allow any person to talk to you or communicate with you in any way about any matter concerning this case. If anyone attempts to talk to you or communicate with you in any way about any matter concerning this case, it is not only a contempt of Court; it is an insult to your intelligence, your integrity and honesty as jurors and you should report the matter to the Court at once and they will be dealt with for contempt. Don't form any opinion as to the guilt or innocence of the defendants, or either of them, until the case is finally submitted to you. Don't discuss the case among

yourselves. Don't talk to the parties, the witnesses or the attorneys about any matter whatsoever. Just dismiss this case from your minds. Insulate yourselves in every way from all contact relative to the case until you reassemble [fol. 288] here in the jury box after the recess of the Court.

If there is no objection to the admonition, the Marshal may announce a fifteen minute recess.

(Reporter's Note: At this time Court was in recess for fifteen minutes, after which the following proceedings were had:)

THE COURT: Let the record show the defendants are present in person and by counsel and the United States Attorney is present in the Court Room. Gentlemen, do you waive the calling of the Jury?

MR. SILER: The United States does, Your Honor.

MR. McILWAIN: The defense does, Your Honor.

THE COURT: All right, let Mr. West come back around.

(Reporter's Note: At this time the witness, WILLIAM WEST, returned to the witness stand, and direct examination was continued by Mr. Siler:)

Q. 19. Mr. West, directing your attention to these slips of paper which you have placed on the cartons here, would you state what the two pink slips are?

A. Those are acknowledgments.

[fol. 289] Q. 20. And what is the blue slip here on this box?

A. That is also an acknowledgment.

Q. 21. What is the white sheet here on the box to my left?

A. That is an original invoice.

Q. 22. Now, are all these papers which you have placed here, are they kept in the ordinary and regular course of business of Central Jobbers?

A. Yes, sir.

Q. 23. And is it ordinary and regular your course of business to keep these records?

A. Yes, sir.

Q. 24. From these slips of paper, which you have presented here, how are you able to identify these particular boxes?

A. There is a number that appears on the acknowledgment that also appears on the cartons. There are two separate numbers. There is a stock number.

Q. 25. Is this a unique number or a number which could be on other boxes?

A. No, sir, it would have to be on the boxes the acknowledgment states it is.

Q. 26. Are you satisfied as to the identification of these boxes with these pieces of paper which you have presented [fol. 290] here in Court?

A. Yes.

MR. BURNS: Objection, if Your Honor please.

THE COURT: The objection is sustained to the form of that question.

MR. BURNS: We move to admonish the jury.

THE COURT: Members of the Jury, you are admonished not to consider the statement made by this witness—you are not to consider for any purpose the statement by this witness as to whether he is satisfied with the identification of these documents insofar as they may relate to these particular parcels. That calls for a conclusion on his part. The objection is sustained to it, and you are admonished not to consider for any purpose that statement—that question or answer.

All right, go ahead.

Q. 27. Mr. West, when was the first occasion you had to match up the numbers either on the invoices or the acknowledgments to these particular cartons which appear in the Court Room today?

A. It was on August 29th in Manchester, Kentucky.
[fol. 291] Q. 28. And was this in 1970?

A. Yes, sir.

Q. 29. And where in Manchester, Kentucky, was it?

A. At the Knuckles Dollar Store.

MR. McILWAIN: Object, if Your Honor please.

THE COURT: You mean for the reasons heretofore stated?

MR. McILWAIN: Yes.

THE COURT: Overruled.

Q. 30. Now, Mr. West, before any of the merchandise was taken from the Knuckles Store on the 29th of August, 1970, tell whether or not papers which were kept in the regular and ordinary course of business of Central Jobbing were matched with boxes which were taken out?

A. Yes, sir, they were.

Q. 31. And were any boxes taken out of there which you did not have papers for, such as these which you have here in the Court Room today?

A. No, sir.

Q. 32. Now, Mr. West, do you have invoices or acknowledgments in your possession today which were kept in the regular and ordinary course of business of [fol. 292] Central Jobbing which matched up with the boxes which were isolated and which were taken from the Knuckles Dollar General Store on the 29th of August, 1970?

A. Yes, sir.

Q. 33. And was it the regular and ordinary course of business to keep these records?

A. Yes, sir.

Q. 34. Would you produce those at this time?

A. Yes, sir.

MR. BURNS: Objection, if Your Honor please.

THE COURT: Well, have you gentlemen seen them?

MR. BURNS: No, sir, we have not.

THE COURT: All right, let defense counsel look at them and then I will rule on the objection.

Are they kept in some manner there, Mr. West?

THE WITNESS: They are by companies that the merchandise was purchased from.

THE COURT: All right, look at them, but be careful not to scramble them anybody, either for defense or [fol. 293] the United States.

MR. BURNS: We will—

THE COURT: No, I want you to examine them. Approach the Bench, Gentlemen. Come up.

(Reporter's Note: The following proceedings were had at the Bench, out of the hearing of the Jury:)

THE COURT: What I am trying to say is, he has been having so much trouble separating them, I don't want to get them mixed up and have to have him separate them again.

MR. BURNS: Your Honor please, we wanted to say to the Court, we thought maybe as he put them in in his order, we could look at them, if you will let us object to anything we see then.

THE COURT: All right, what about that, Gentlemen?

MR. SILER: I wanted to put them all in at once to save time.

THE COURT: What I was trying to say and I want [fol. 294] to make it very careful not to preclude somebody. There's a dozen folders here, and I didn't want to get them out of order. If you want to look at them now, we will let you. If you want to take them one by one, it will take a little longer, but we don't want to get in any hurry. What do you think about looking at them there at the table and put you a paper clip or something on each one that you raise some issue about or maybe you have a blanket objection to all of them.

MR. BURNS: With permission of the Court, you can go ahead and he can listen to the direct examination, and I will be looking at them, and then we can make our objection, and we can move right on through the case.

THE COURT: All right, if you want to do it that way, that's all right with me.

(Reporter's note: This concluded the proceedings had at the Bench.)

THE COURT: All right, gentlemen, if you are ready, you may proceed. I understand Mr. Burns is going to examine them while the direct examination is being conducted [fol. 295] and Mr. McIlwain will follow the matter for the defense.

All right, go ahead.

Q. 85. Mr. West, tell whether or not these boxes and other boxes, which were isolated about which you testi-

fied Friday, were marked by persons to identify them later?

A. Yes, sir.

Q. 36. And was anything put on these boxes to mark them or mark some of them in a certain area of your warehouse?

A. There was spray paint sprayed on the cartons.

Q. 37. Do you see any of that spray paint on any of these cartons here today?

A. Yes, sir.

Q. 38. Would you step down and point to the jury—turn it around in the direction of the jury, and point it out to the jury?

A. Yes, sir.

(Reporter's Note: At this time the witness stepped down from the witness stand and went to the boxes stacked in front of the Clerk's desk, and turned said cartons toward the jury and pointed to a strip of paint, or what appeared to be paint, on the cartons.)

Q. 39. Mr. West, have you examined all these boxes on the outside?

A. Yes, sir.

[fol. 296] Q. 40. Now, tell the Court and jury how much of them, how many of those are still sealed as they were on the date of August 29, 1970, when you first saw them?

A. They are all in the same condition as they were when I first saw them.

Q. 41. And—now these boxes that appear to be opened up, specifically, this one here that says "Made in Spain", have you looked at that one?

A. Yes, sir.

Q. 42. And do you know what is in that box?

A. Yes, sir.

Q. 43. What is in that box?

A. Men's loafers.

Q. 44. And how are you able to tell that?

A. From the stock number that appears on the box and the carton, the individual box and also appears on the outside of the carton.

Q. 45. Do those numbers match?

A. Yes, sir.

Q. 46. And did you look in that box at some time to see if those numbers match?

A. Yes, sir.

Q. 47. Have you looked in them today?

A. Yes, sir.

Q. 48. Do they match?

[fol. 297] A. Yes.

Q. 49. With regard to this box here, which is the nearest one to you, did you look to see whether the top of it appears to be slightly broken?

A. Yes, sir, I did.

Q. 50. And are you able to tell whether or not any merchandise can be put in or taken out of there?

A. No, sir, but the same numbers appear there also on the inside and outside of the carton.

Q. 51. If you were to open up these other boxes here today, according to your experience working there for Central Jobbers, would there be any identification number inside which would correspond with any number on the outside?

A. Not on all of them because the canvas, is poly-bagged, and no number appears on the plastic bag.

Q. 52. But there are on the other ones?

A. Yes, sir.

Q. 53. After you went back to Cincinnati Friday—is that where you went Friday?

A. No, sir, I didn't go straight back Friday.

Q. 54. Well, did you go back to your warehouse sometime during the weekend?

A. Yes, sir, Sunday.

[fol. 298] Q. 55. Did you have occasion to make an accurate count of this particular isolated group of merchandise as to what the market value, that is the retail value, of all those which you had isolated and which had been identified by your company? Did you make that determination?

A. Yes, sir, I did. I run a tape on the total.

Q. 56. What was that determination as to the value?

A. The retail value was \$13,699.00, if I remember correctly. The tape is here with the invoices.

Q. 57. All right. Can you step down here and get the tape to get the exact figure?

A. Yes, sir.

(Reporter's Note: At the direction of the United States Attorney, the witness again left the witness stand and went to the boxes in front of the Clerk's desk, and secured a tape from the invoices and papers which he had previously laid on the boxes.)

A. The retail value is \$13,699.20.

Q. 58. What was the wholesaler's cost of those items?

A. Wholesaler's cost was—this does not include freight or warehouse charge, was \$6,722.43.

Q. 59. \$6,000—what again?

A. \$6,722.43.

* * * *

[fol. 326] The witness, LAWRENCE BLACK, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SILER:

Q. 1. State your name, please.

A. Lawrence Black.

Q. 2. Where do you live, Mr. Black?

A. Norton, Virginia.

Q. 3. What business or job do you hold?

A. I am a Manager, Supervisor and a Buyer for Geller Stores Company.

Q. 4. How long have you worked for Geller Stores Company?

A. Better than 25 years.

[fol. 327] Q. 5. Have you always worked at Norton for that outfit?

A. No, sir.

Q. 6. Where else have you worked?

A. Lebanon, Kentucky, Circleville, Ohio, and occasions in Cincinnati.

Q. 7. During this period of time have you been acquainted with the records of customers of Central Jobbing Company?

A. State that question again.

Q. 8. Are you familiar with the customers of Central Jobbing Company?

A. Yes, sir.

Q. 9. And during this period of time that you worked for Central Jobbing Company, state whether or not you know that it had a customer by the name of Clinton Knuckles of Manchester, Kentucky.

A. Not to my knowledge, no, sir.

Q. 10. Did you ever have Knuckles Dollar Discount Store or some name of that sort?

A. No, sir, not to my knowledge.

Q. 11. Did you have occasion to go down to the Knuckles Store on or about August 29, 1970?

A. Yes, sir.

Q. 12. And what did you see down there?

[fol. 328] A. When we got there that morning, we went into the store and saw Central Jobbing merchandise.

MR. McILWAIN: Objection, if Your Honor please.

THE COURT: The objection is sustained on the ground that it is a conclusion of the witness.

Q. 13. You saw merchandise that had what on it?

A. Had Central Jobbing cartons on the outside.

Q. 14. Did you see any further cartons of this sort in the store?

A. Yes, sir.

Q. 15. And what was done with the merchandise which you have testified about that had Central Jobbing Company's name on it?

A. This was inventoried by the federal officials and we took and loaded this on the trailers that were there.

Q. 16. Were you there when this occurred?

A. Yes, sir, I did the loading myself.

Q. 17. Did you help identify the boxes there?

A. Yes, sir.

MR. McILWAIN: Objection, if Your Honor please. to this entire line of questioning concerning the store and

[fol. 329] what they found in it for the reasons we had before.

THE COURT: All right, let the objection be overruled. Go ahead.

Q. 18. And what did you identify some of these boxes from, what did you compare them with? Did you have anything from the company?

A. These same boxes were in the store that is in the town that I live and where I work. We have two stores in this particular town. One is a discount store. One is a Department store, and I get merchandise in these cartons myself, and so does the discount store get merchandise.

Q. 19. They were the same type of cartons?

A. Yes, sir.

Q. 20. They were not the same cartons that you had but the same type of cartons?

A. The same type, yes, sir.

* * * *

[fol. 330] The witness, GEORGE ALLF, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SILER:

Q. 1. State your name, please.

A. George Allf.

Q. 2. Where do you live, Mr. Allf?

A. London, Kentucky.

Q. 3. What is your position?

A. I am Special Agent, Federal Bureau of Investigation.

Q. 4. How long have you been a Special Agent with the F.B.I.?

A. Seventeen years.

Q. 5. What is your post of duty?

A. I am Resident Agent in London, Kentucky.

Q. 6. Did there come a time when you had occasion to investigate this case at hand here?

A. Yes, sir.

Q. 7. And what date did you first take any action in this case?

A. August 29, 1970.

Q. 8. And where did you go pertaining to this?

A. Well, on that date around noontime, I proceeded to Manchester, Kentucky, with Kentucky State Police [fol. 331] Detective Bob Cox.

Q. 9. Did you go to the Knuckles Discount or Knuckles Dollar Store at Manchester?

A. Yes, sir.

Q. 10. And when you arrived there, what did you observe in the Knuckles Store?

A. Well, even before we went into the store, there is a storeroom next to the store entrance and from the sidewalk through the window, we observed a box near the window and on the box there was a marking to Central Jobbers Company from Suave Shoe Company, I think it was, Hialeah, Florida.

Q. 11. Later on that day, did you have occasion to go inside the store and see any boxes similar to that that you saw in the window?

A. Yes, sir, then I went inside in the store area itself, and I observed three other boxes also marked to Central Jobbing Company, Cincinnati, Ohio.

Q. 12. After you had been there, did you ever have occasion to see any invoices or anything that someone matched up with any of these boxes?

A. Yes, sir, I did.

Q. 13. And who had those invoices?

A. Mr. Abe Geller brought them into the store in company with Mr. Bill West.

[fol. 332] Q. 14. Were you able to locate in the Knuckles Dollar Store any invoices or acknowledgments that they owned these particular boxes?

MR. McILWAIN: If Your Honor please, there is an objection.

THE COURT: Approach the Bench, Gentlemen.

(Reporter's Note: The following proceedings were had at the Bench, out of the hearing of the Jury:)

THE COURT: Do you have any additional ground for objection, Mr. McIlwain, other than that heard in connection with the motion?

MR. McILWAIN: Yes, the primary reason is one in connection with the motion, but secondary, there is no testimony he made any investigation as to whether Knuckles owned or bought it individually. He asked him whether he found anything that showed—

THE COURT: I think you would have to show what investigation he made, if he just walked in and walked out and didn't look or inquire; it would be a likely impression that Knuckles didn't have any such documents, when in truth and fact he may have had one. The [fol. 333] question was did he have any documentation for ownership. Again that might call for a conclusion on the part of the witness. Something might indicate ownership to one person and not to another.

MR. McILWAIN: That's true.

THE COURT: I think it probably should be, if you can lay the foundation.

MR. SILER: I can do that.

THE COURT: And it would be limited to anything referring to title to it or something of that characted.

(Reporter's Note: This concluded the proceedings had at the Bench.)

THE COURT: The objection is sustained at this time.

Q. 15. Mr. Allf, when you were there in the Knuckles Dollar Store, did you make any investigation as far as trying to locate any references in the store to any of the merchandise there which Mr. Geller had claimed as his own?

A. Yes, sir.

Q. 16. And what investigation did you make?

A. Well, first I determined—Mr. West was the first [fol. 334] one I talked to and he claimed that most of the merchandise—

MR. McILWAIN: Objection.

THE COURT: Sustained.

Q. 17. Well, after you talked to him, did you make inquiry as to any person connected with the store about it?

A. Yes, sir.

Q. 18. And who was that?

A. I requested Mr. Clinton Knuckles.

Q. 19. Did Mr. Clinton Knuckles produce to you any documents or anything referring to this merchandise which was taken out of that store on this weekend?

A. No, sir.

MR. McILWAIN: If Your Honor please, we want to note an objection to this entire line of questioning based on the original ground.

THE COURT: All right, if there is no other grounds other than the original grounds, the objection is overruled. All right, go ahead.

Q. 20. What was your answer?

A. No, sir, he did not make objection.

[fol. 335] Q. And did he present any papers referring to any of this merchandise?

A. No, sir, he presented no such papers.

Q. 22. Have any papers referring to any of this merchandise ever been shown to you or sent to you from Mr. Knuckles or his representatives?

A. No, sir.

Q. 23. Now, Mr. Alf, did there come a time during this weekend, the 29th or the following day or so, that you had occasion to take an inventory of the merchandise which was taken from the Knuckles Dollar Store on this occasion?

A. Yes, sir.

Q. 24. Do you have that inventory with you at this time?

A. Yes, sir, I do.

Q. 25. And is that in substantially the same condition of this inventory?

A. Well, the entire inventory was under my supervision, but there were several agents of the F.B.I. that assisted. The inventory had to be conducted in two places because of the volume of the merchandise. This is in the

storeroom that I just testified to, and then also upstairs [fol. 336] over the store, we located another storage area; so the inventory covers both of these places.

Q. 27. Now, besides the places which—strike that—are there any pages there in the inventory which you have initialed?

A. Yes, sir.

Q. 28. And besides the pages which you have initialed, are there pages which have other initials?

A. Yes, sir.

Q. 29. And what initials are those?

A. At certain places, they are Kentucky State Police Detective Bob Cox's initials, R.E.C. Another place there is Special Agent Larry Bonney, and also Special Agent Michael Irwin.

Q. 30. Are they with the F.B.I.?

A. Yes, sir, Agents Bonney and Irwin are, and then Detective Cox is with the Kentucky State Police.

MR. SILER: At this time, Your Honor, we would like to have that marked for identification as Government's Exhibit No. 27.

THE COURT: Let it be marked for identification.

MR. BURNS: Your Honor please, we object on the [fol. 337] former grounds.

THE COURT: All right. Let the objection be overruled to marking them for identification.

THE CLERK: Government's Exhibit No. 27 for identification.

Q. 31. Now, Mr. Allf, were certain numerical figures put under a marking of value on that inventory?

A. Yes, sir.

Q. 32. Where did you receive those numerical values?

A. They were supplied by Mr. West.

Q. 33. Was this inventory ever shown to Mr. West or Mr. Geller?

A. Yes, sir.

Q. 34. Did you give them a copy of it?

A. Yes, sir, I furnished a copy to Mr. Knuckles, and to Mr. Geller.

MR. SILER: You may ask him.

CROSS EXAMINATION

BY MR. BURNS:

Q. 1. Mr. Allf, I believe you have testified that Mr. Knuckles made no objection when you and the other officers were there seizing this property. Is that correct?

A. Yes, sir.

[fol. 338] Q. 2. You and the other officers were there pursuant to a search warrant which had been issued by a judicial officer. Is that correct?

A. I wasn't there in pursuance of the search warrant, no, sir, at that time.

Q. 3. You were there pursuant to the search warrant when the property was being seized, weren't you Mr. Allf?

A. When it was being seized, yes, sir, I was.

Q. 4. What would you do to a person whose home or business you were searching under a search warrant if he did object?

A. Nothing.

Q. 5. Nothing? You know it is a violation of both state and federal law to interfere with the execution of a legal search warrant, don't you?

A. Yes, sir.

Q. 6. So really the one you are searching has no right to object, does he, Mr. Allf? Under the law.

A. A search warrant is directed to a place. It is a command to the officer to search a place.

Q. 7. And the person has no right to object legally, does he?

A. Yes, sir.

Q. 8. He does?

A. He can object legally, yes, sir.

[fol. 339] Q. 9. In Court later?

A. Yes, sir.

Q. 10. Did I hear you correctly when you testified that the entire inventory was made under your supervision?

A. Yes, sir.

Q. 11. Was I mistaken during former testimony when you testified that when the inventory reached the point of \$5,000.00, you stepped in?

A. I started the inventory even before that to see if we could get to \$5,000.00, and when we reached that, we went on with the inventory, a continuation of what I have introduced here already.

Q. 12. Do you know when this property was taken from Central Jobbing?

A. No, sir.

Q. 13. Do you know who took this property from Central Jobbing, from your own knowledge?

A. No, sir.

Q. 14. Do you know how it got to the Knuckles Store, from your own knowledge?

A. No, sir.

MR. BURNS: That's all. Thank you, sir.

THE COURT: Anything on re-direct?

[fol. 340.]

RE-DIRECT EXAMINATION

BY MR. SILER:

Q. 1. Mr. Allf, state whether or not you specifically asked Mr. Knuckles for any documentation of his merchandise.

MR. McILWAIN: Objection.

MR. BURNS: Objection, hearsay.

THE COURT: Approach the Bench, Gentlemen.

(Reporter's Note: The following proceedings were had at the Bench, out of the hearing of the Jury:)

THE COURT: Wouldn't it be admissible as to Count 1 under the ruling, Gentlemen?

MR. BURNS: Judge, usually I would say yes, but in this case I would say no; as to whether or not Mr. Knuckles had any proof of ownership or alleged proof of ownership would have nothing to do with this because they have already proved he did not own it by their witnesses and that it was stolen property.

THE COURT: I think any statement made by an alleged co-conspirator, assuming it meets the other tests,

[fol. 341] would be admissible as to Count 1 but not as to Count 2.

MR. BURNS: It is our contention after an arrest has been made anything said by any of the co-conspirators is not admissible.

THE COURT: You mean the Miranda rule? Is that what you are getting at or are you not raising that? You admit proper admonition was given to Mr. Knuckles, or was it?

MR. BURNS: We contend it was not back, but I don't think it would apply.

THE COURT: These defendants couldn't raise it, could they?

MR. BURNS: That's correct. We are saying that after the arrest had been made, anything that Knuckles said could not have been made in furtherance of any conspiracy.

THE COURT: It could be an admission—what do you have to say, Mr. Siler.

[fol. 342] MR. SILER: First, Your Honor, I don't think what Mr. Alf said Mr. Knuckles said—what he says is—he could cross examine for the purpose of hearsay.

Now, secondly, I think, even if it were, it would be admissible because the conspiracy is not over in the mind of Mr. Knuckles, if he did participate in a conspiracy, until he is informed—

THE COURT: Read the question back to me.

(Reporter—Reading: Mr. Alf, state whether or not you specifically asked Mr. Knuckles for any documentation of his merchandise.)

THE COURT: The objection is overruled insofar as it relates to Count 1 of the indictment and is sustained insofar as it relates to Count 2 of the indictment Gentlemen.

(Reporter's Note: This concluded the proceedings had at the Bench.)

THE COURT: The objection is overruled insofar as it relates to those matters charged in Count 1 of the indictment and is sustained insofar as it may relate to those matters charged in Count 2 of the indictment.

[fol. 348] Q. 2. Do you remember the question, Mr. Allf?

A. No, sir, I don't. Would you please repeat it?

Q. 3. It was. I think, more or less,—I asked you if you specifically asked Mr. Clinton Knuckles, in his store on the 29th of August, 1970, as to whether or not he had any documentation for any of the merchandise which was claimed there?

A. I asked him specifically several times for documentation.

Q. 4. Did you ever receive any documentation?

A. No, sir.

THE COURT: Members of the Jury, you are not to consider this question and the answer given by the witness insofar as it may relate to Count 2 of the indictment. The Court will instruct you insofar as the effect to be given to such question and answer and the admissibility insofar as it may relate to Count 1 of the indictment. Don't consider it in relation to Count 2 of the indictment.

All right, go ahead, Gentlemen.

Q. 5. Specifically, what did Mr. Knuckles say about that?

MR. BURNS: Objection.

[fol. 344] THE COURT: Overruled.

A. Well, for the most point he nodded his head and walked away from me.

Q. 6. Did he ever say any specific thing about it, as to whether you should take it or leave it there?

A. Yes, sir. He said first, "Do you say that I have the right to a lawyer?" I said, "Yes, sir, just like we had advised you. You do have the right to a lawyer." He said, "I will just wait until I see my lawyer."

Q. 7. Did he say anything else about it?

A. Then I asked him again and he would just stand silent.

THE COURT: Members of the Jury, you are not to consider the answers given by the witness in regard to this matter in any way insofar as it may relate to the charge embraced in Count 2 of the indictment. These

defendants were not present at the time and as to Count 2 of the indictment, it would be hearsay as to them. You are not consider in relation to Count 2 of the indictment.

Q. 8. Mr. Alf, have you examined these boxes which appear in the Court Room here today?

A. Yes, sir, I have.

Q. 9. Do your initials appear on any of them?

[fol. 345] A. Yes, sir.

Q. 10. Would you step down and point to which, if any, of these your initials do appear on?

(Reporter's Note: The witness stepped down from the witness chair and went to the boxes stacked in front of the Clerk's desk.)

A. My initials appear on this carton right here.

Q. 11. And what do your initials have on—what does it say?

A. It says, "G.W.A. 8-29-70."

Q. 12. What significance is that to you?

A. At the time the inventory was taken at the Knuckles Dollar Store, to obtain the jurisdictional amount of over \$5,000.00 which is necessary, we sequestered or segregated a certain part of the inventory, and each box taken on the inventory, I did initial the box.

Q. 13. Did you initial more than one?

A. Yes, sir.

Q. 14. And at the time you initialed that box, was it a sealed box?

A. Yes, sir.

Q. 15. And is it in substantially the same condition it was in at the time you initialed it?

A. It is still sealed, yes, sir.

[fol. 346] MR. SILER: At this time we move to introduce that as Govenrment's Exhibit No. 28.

THE COURT: Any objections? That box, is that right?

MR. SILER: Yes.

MR. BURNS: We object on the grounds heretofore announced.

THE COURT: All right, if there are no additional grounds, Gentlemen, let the objection be overruled and let it be filed as Exhibit No. 28.

THE CLERK: Government's Exhibit No. 28 filed.

MR. SILER: Mr. Allf, you may have your seat back.

(Reporter's Note: At this time the witness returned to the witness stand.)

MR. SILER: No further questions.

THE COURT: All right, you may step down, Mr. Allf. Call another.

[fol. 347] MR. SILER: Detective Robert Cox.

The witness, ROBERT COX, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SILER:

Q. 1. State your name, please.

A. Robert Cox.

Q. 2. And what is your position?

A. I am a Detective with the Kentucky State Police.

Q. 3. How long have you been with the Kentucky State Police, Mr. Cox?

A. About 6 years.

Q. 4. And where do you live now?

A. I live here in London.

Q. 5. Did there come a time around the 28th day of August, 1970, when you had occasion to investigate the case on hand here?

A. Yes, sir.

Q. 6. And who were you with at the time?

A. Agent Allf of the F.B.I.

Q. 7. And where did you go to with regard to this case?

A. We went to Knuckles Dollar General Store in [fol. 348] Manchester, Kentucky.

Q. 8. During—after you got there to the store, did you have occasion to see any boxes which had the name of Central Jobbers on them?

A. Yes, sir, I did.

Q. 9. Did you have occasion to participate in making an inventory of any of this stuff?

A. I did.

Q. 10. And who participate with you in this?

MR. McILWAIN: We want to enter an objection to anything that went on in the store—Knuckles Store at Manchester.

THE COURT: For the same reasons heretofore advanced.

MR. McILWAIN: Yes.

THE COURT: All right, overruled. Go ahead.

A. You mean the inventory?

Q. 11. Yes, in the inventory?

A. Agent Allf, myself, Agent Emet Michaels, Agent Larry Bonney, and there were several representatives from the Cincinnati company involved.

Q. 12. And did you have occasion on that date to [fol. 349] mark any boxes?

A. Yes, sir.

Q. 13. Would you step down here in the court room and look at these boxes and see if you can find any of those that you marked on that day?

(Reporter's Note: At this time the witness stepped down from the witness chair and went to the stack of boxes in front of the clerk's desk, and there was a short pause while he examined the boxes in question.)

A. On these boxes.

Q. 14. Would you put your hand on each one where you see your name or initials?

A. This one, this one, this one, this one, this one on the bottom, this one, this one.

Q. 15. Is that all but one?

A. Yes, sir.

Q. 16. And what initials are those on there?

A. Mine.

Q. 17. Yes. What is your initials?

A. R. E. C.

Q. 18. And when did you put your initials on there? What date specifically?

A. August 29th.

Q. 19. And how do you know that?

[fol. 850] A. I have the date written under my initials.

Q. 20. Now, are those boxes which you initialed, are they in substantially the same condition they were in at the time that you marked them as far as you can tell?

A. Yes, with the exception of this red paint on the side.

Q. 21. And the boxes which are sealed, were they sealed at that time?

A. Yes, sir, they were.

Q. 22. And what about that one which is unsealed, do you recall whether it was unsealed at the time?

A. No, sir, I can't recall.

Q. 23. You may take you seat back up there, Mr. Cox.

A. Mr. Siler, I would like to make one correction to my testimony. I don't believe that Agent Michael was involved. Emet Michaels which I have previously stated was with us,—he wasn't there. It was another agent.

Q. 24. Oh. Would it be Michael Irwin?

A. Yes, that is correct.

MR. SILER: I will ask the Marshal to pass this inventory to the witness.

THE MARSHAL: This?

[fol. 351] MR. SILER: Yes.

(Reporter's Note: At this time the document in question was handed to the witness and he examined same.)

Q. 25. Mr. Cox, you have been given Government's Exhibit No. 27. Do you recognize that particular item there?

A. Yes, sir, I do.

Q. 26. And what is that?

A. This is our original copy of the inventory.

Q. 27. And is this the one that was taken at Knuckles Dollar Store on the date you testified about?

A. That is correct.

Q. 28. Do you see your initials appearing on any of the pages in that inventory?

A. Yes, sir.

Q. 29. And what are those initials?

A. R.E.C.

Q. 30. Does it have anything else on there to indicate a date or anything?

A. Yes, sir.

Q. 31. What date is that?

A. 8/30/70.

Q. 32. And this was an inventory of what?

[fol. 352] A. This was an inventory of merchandise found in the second floor of Mr. Knuckles' building.

Q. 33. And did you participate in that inventory?

A. Yes, sir, I did.

Q. 34. Is that—those papers which have your initials on them, are those the ones which you participated in and counted?

A. Yes, sir.

MR. SILER: At this time, Your Honor, the United States wishes to introduce all but the top box here as Government's Exhibits 29, 30, 31, 32, 33, 34, and 35.

MR. BURNS: We object, Your Honor.

THE COURT: Any additional objection other than those heretofore interposed?

MR. BURNS: The same objection.

THE COURT: You make no issue about the integrity, is that right, Gentlemen?

MR. BURNS: This is correct.

THE COURT: Sir?

[fol. 353] MR. BURNS: That is correct.

THE COURT: All right, let the objection be overruled. Let those be filed, that have been identified by this witness.

THE CLERK: Government's Exhibit Numbers 39, 30, 31, 32, 33, 34 and 35 filed.

MR. SILER: You may ask him.

THE COURT: Wait just a minute. Let's get them marked, Gentlemen, because one of them is not yet in evidence.

(Reporter's Note: At this time there was a short pause in the proceedings while the Clerk marked the exhibits filed at this time.)

THE COURT: All right, Gentlemen, do you agree the correct ones are so identified here by the Clerk's Bench?

MR. BURNS: Yes.

MR. SILER: Yes.

[fol. 354] THE COURT: All right, you may mark them filed and you may proceed to cross examine.

MR. SILER: I am through with direct.

THE COURT: All right, you may cross examine when you are ready.

CROSS EXAMINATION

BY MR. BURNS:

Q. 1. Mr. Cox, from your own knowledge, do you know who brought this merchandise to the Knuckles Dollar Store in Clay County?

A. No, sir, I don't.

Q. 2. From your own knowledge, Detective Cox, do you know the value of that merchandise?

A. No, sir.

Q. 3. From your own knowledge, Detective Cox, do you know when this merchandise was brought to Knuckles Dollar Store?

A. No, sir, I don't.

* * * *

[fol. 359] MR. SILER: Mr. William West.

The witness, WILLIAM WEST, having been heretofore sworn, testified as follows:

RE-DIRECT EXAMINATION

BY MR. SILER:

Q. 1. Mr. West, since you testified last, have you had an opportunity to isolate those invoices or other papers which you testified about concerning the merchandise

[fol. 360] which segregated on the 29th and 30th of August, 1970?

A. Yes, sir.

Q. 2. Do you have those with you at this time?

A. Yes, sir.

Q. 3. Would you please produce those?

A. Yes, sir.

Q. 4. Are those the ones there?

A. Yes, sir.

Q. 5. Do you know how many groups—

MR. SILER: Would you hand these to counsel for defendants?

(Reporter's Note: At this time the Marshal handed a group of records to the defendants' counsel.)

Q. 6. Do you know how many groups of these there are, Mr. West?

A. No, sir, I don't.

Q. 7. And are these the invoices which you testified about or other records of Central Jobbers, which are kept in the ordinary course of business and regular course of business?

A. Yes, sir.

Q. 8. And is it the regular and ordinary course of business to keep these?

A. Yes, sir.

Q. 9. Have the numbers—unit numbers on these documents [fol. 361] here been matched to those boxes of merchandise which Central Jobbers picked up at Knuckles Dollar Store on the 29th and 30th of August, 1970?

MR. BURNS: Objection, if Your Honor please.

THE COURT: For the reasons heretofore advanced?

MR. BURNS: Yes, sir, that is correct.

THE COURT: Overruled. Go ahead.

A. Yes, sir.

Q. 10. Were they all matched?

A. Yes, sir.

MR. SILER: At this time, Your Honor, we move for introduction of these as Government's Exhibits Numbers 28 through 63. I believe there are 37 of them.

MR. BURNS: Objection.

THE COURT: Approach the Bench, please, Gentlemen.

(Reporter's Note: The following proceedings were had at the Bench, out of the hearing of the Jury:)

[fol. 362] THE COURT: What's the point of your objection?

MR. BURNS: Judge, we have four.

Number 1—It is our contention that this man has not been properly qualified to introduce these records.

The second is these records are made based upon the search and seizure.

The third is these documents or papers do not constitute the best evidence.

The fourth is—

THE COURT: Well, what would the best evidence be?

MR. BURNS: The items themselves. They have them in their custody.

The fourth—these invoices and bills and what-not are not in the state and condition as when received from the company.

THE COURT: In what way?

MR. BURNS: They have been altered, written upon, on each of them, figures have been added and deleted.

[fol. 363] THE COURT: Well, Mr. Siler, rather than just saying these are records, I really think it is time consuming, but can you just put them in that way without showing what they are and connecting them up to whatever they connect up to? That's what is commonly called "Wheelbarrowing them in."

MR. SILER: Your Honor, I think where you have—I have got a case to back this fact up where you have a tremendous amount of evidence of this sort, according to my information, the witness is allowed to summarize what the records show and he testified that he matched those numbers with the boxes which were recovered from the Knuckles Store on the 29th of August, 1970.

THE COURT: You asked him if he had invoices and other records. I just think we are going to have to go into it in some more detail than that. It may be a little tedious but you moved that they be marked Exhibits Numbers 37 through 65 without showing which is which. I think you are going to have to make them up and show

what this refers to and then you move to introduce that one and down the line like that.

[fol.364] While it is tedious, and they have objected to it, I think you will have to identify them in a more specific manner. I can appreciate your trying to save time about it, but we might be wasting it trying to save it.

MR. SILER: If that is what they desire, I am willing to put them in one at a time.

THE COURT: I believe you would have to do it that way and show that each one was connected up to some particular item which was kept there.

Now, as to the objection it is not the best evidence. Of course, I think they can introduce the invoice and say these things were kept and if you all make any issue about it or made any motion for production of the merchandise, I would have to rule on that at that time. I understand there is a great quantity of it from this evidence, or alleged to be a great quantity of it, and I don't think the obligation would be for the United States, if there was a train load of the merchandise, to bring the whole train down here; but by the same token, they would have to make it available and bring it if a question arose about it; or at least as to this part that is segregated and kept. [fol.365] Of course, that is what the evidence relates to. It is just general as to the rest of it, isn't it, Mr. Siler?

MR. SILER: That's right.

THE COURT: The objection is sustained as to introducing these exhibits in this manner. I think you will have to go into it in more detail, and I will rule on it.

Read me back his objections, please mam.

THE REPORTER: (Reading:) "Number 1—it is our contention that this man has not been properly qualified to introduce these records."

THE COURT: Well, have you shown it was in his custody and under his control?

MR. SILER: I think I did, but I am willing to ask him again.

THE COURT: Through an abundance of caution and they have raised an issue about it, maybe you ought to do it.

What was the next one? What was the best evidence?

THE REPORTER: (Reading) "The records are made [fol. 366] based upon the search and seizure."

THE COURT: Read me that again.

THE REPORTER: (Reading) "The records are made based upon the search and seizure."

THE COURT: Of course, the search and seizure are one thing, except it comes into his identification of it.

THE REPORTER: (Reading) "These documents or papers do not constitute the best evidence."

THE COURT: What is the fourth ground?

THE REPORTER: (Reading) "These invoices and bills and what-not are not in the state and condition as when received from the company."

THE COURT: Well, if there is any additions made to them—for instance, I notice there's some writing on one of these. I don't know whether it was on there when they got it. Specifically, I am referring to Invoice No. 1263 from the Rosia Shoe Corporation. There is some writing on there in pen, "O.K." Etc. Of course, the fact [fol. 367] that something has been put on it, if it is explained away, I don't think it would in and of itself be admissible, and then on the waybill is a name of, I assume, the man that signed for it. It should be shown what all those things are. That's the question you make about it—anyway, the objection is sustained at this time. I think you will have to go into it in more detail.

MR. SILER: All right, I will take them and go through them one at a time.

THE COURT: Gentlemen, I note here in each one of these envelopes, there is a number of tickets. Don't you think you ought to give a letter to each one of those so you can tell what you are talking about. If you don't, somebody examining them might be in some doubt as to what you are referring to.

(Reporter's Note: This concluded the proceedings had at the Bench.)

THE COURT: All right, go ahead, Gentlemen.

MR. SILER: I will ask that the Marshal pass this—

MR. BURNS: If Your Honor please, may we approach [fol. 368] the Bench?

THE COURT: Yes, come back up.

(Reporter's Note: The following proceedings were had at the Bench, out of the hearing of the Jury:)

MR. BURNS: Mr. McIlwain and I have just been discussing this and we have decided to withdraw the objection as to them being filed as a group exhibit subject only to our objection as to the best evidence and they came as a result of the search and seizure.

THE COURT: You are making no issue about these pencil notations?

MR. BURNS: No, sir.

THE COURT: And you are making no issue about this man's authority to introduce them in evidence?

MR. BURNS: That's correct. That is exactly what we are saying.

THE COURT: But you are relying on those issues presented by the search and seizure and further on your [fol. 369] objection as to the best evidence?

MR. BURNS: Yes.

THE COURT: All right, that being the case—

MR. BURNS: That will save a lot of time.

THE COURT: With your objection thus modified, the objection is overruled.

Now, how do you want them marked, Mr. Siler?

MR. SILER: There's 37 of these. That would be 36 through 73.

THE COURT: No objection to that?

MR. BURNS: No.

THE COURT: All right, let them be filed in accordance with the statement of counsel.

(Reporter's Note: This concluded the proceedings had at the Bench.)

THE COURT: All right, let them be filed in accordance with the statement of counsel heard at the Bench.

[fol. 370] THE COURT: All right, go ahead, Gentlemen.

(Reporter's Note: At this time there was a short pause in the proceedings while the Clerk marked the Exhibits just filed.)

THE CLERK: Government's Exhibits No. 36 through 73, filed.

THE COURT: All right, go ahead, Gentlemen.

Q. 11. Mr. West, do you have copies made of those records?

A. Yes, sir.

Q. 12. Xerox copies?

A. Yes, sir.

MR. SILER: I would like permission, Your Honor, to substitute the Xerox copies for these. He may rather have the originals.

THE COURT: I will reserve my ruling on that, Gentlemen. Come up, Gentlemen. Come up.

(The following proceedings were had at the Bench, out of the hearing of the Jury:)

THE COURT: What's the reason for that? The Com-[fol. 371] pany wants their records back?

MR. SILER: Yes, they want their records back.

THE COURT: Well, let them have the Xerox copies. The motion is overruled.

(Reporter's Note: This concluded the proceedings had at the Bench.)

* * * * *

[fol. 382] MR. SILER: The United States recalls Mr. William West.

The witness, WILLIAM WEST, having been heretofore sworn, testified as follows:

RE-DIRECT EXAMINATION

BY MR. SILER:

Q. 1. Mr. West,—

MR. SILER: I will ask the witness—or the Clerk to pass the witness Government's Exhibit No. 27.

(Reporter's Note: At this time Government's Exhibit No. 27 was handed to the witness and there was a short pause while he was examining same.)

Q. 2. Mr. West, have you ever seen that inventory or a copy of it before?

A. Yes, sir.

Q. 3. Where did you see that inventory or a copy of it before?

A. This inventory was taken at Knuckles Store in Manchester, Kentucky, before we took any merchandise out.

Q. 4. Were you there when this was taken?

A. Yes, sir.

Q. 5. Did you put any of those prices on any of that or did someone do it in your presence?

A. Someone did it in my presence.

Q. 6. Who was that?

[fol. 383] A. Mr. Allf.

Q. 7. And who fixed these prices on there?

A. I did.

Q. 8. Now, would you look at the first page there, look at those items and start with the top one, what's listed there, the first one?

MR. BURNS: Objection, Your Honor; that is written hearsay.

THE COURT: Overruled. Go ahead.

A. The first item is No. BB1060. This is the number on the case; the lot number is 1014; and it is 30 pair of Gent's canvas oxfords.

Q. 9. And at what price?

A. At \$1.20.

Q. 10. And what is the value placed on it at the right?

A. \$36.00.

Q. 11. And based on your experience and your knowledge in this field, what value is that? Is that some value in relation to this item there?

A. That is our cost value of the item.

Q. 12. All right. And that is your cost value for that particular item, is that correct?

A. Yes, sir.

[fol. 384] Q. 13. And what is the retail value for that?

A. The retail value is \$2.84.

Q. 14. I mean for the whole item on that line.

A. I would have to figure it up. Thirty times \$2.84.

Q. 15. All right. Are all those prices on that first page there, are they all wholesaler's cost?

A. Yes, sir.

Q. 16. Would you look on page 1 and tell whether or not those are accurate figures as to wholesaler's costs on there?

MR. BURNS: Objection, not the best evidence.

THE COURT: Overruled.

A. Yes, sir, it is wholesaler's cost of the items.

Q. 17. And is the total there—does it represent the total of all those wholesaler's costs?

A. Yes, sir.

Q. 18. And what is that figure?

A. \$424.20.

Q. 19. All right, now would you turn to page 2. Would you look at the items on page 2 of that inventory and tell whether or not the values on there represent some kind of value, whether those are wholesaler's cost, or [fol. 385] market value, or no value at all?

A. This page is also wholesaler's cost.

Q. 20. What is the total amount of that page?

A. \$1,034.21.

Q. 21. Does that represent a total of all the wholesaler's cost on that page?

A. Yes, sir.

Q. 22. Now, relating your attention to both page one and page two, is the retail value or market value of those items more or less than that wholesaler's cost there?

A. It is more.

Q. 23. How much mark-up do you have on those in order to make a retail price?

A. By the time you figure our warehouse cost and the actual retailer's mark up, it is approximately 45%.

Q. 24. Mark it up 45%?

A. Yes.

Q. 25. All right, now turn to page 3. Would you look at those and see if they represent a wholesaler's cost for those various items?

A. Yes, sir, this is wholesaler's cost on this page.

Q. 26. Is there a total for that page?

A. Yes, sir. \$1,228.11.

[fol. 386] Q. 27. Is that total all wholesaler's cost there?

A. Yes, sir.

Q. 28. Would the—or is the retail market value of those items greater or less than the wholesaler's cost?

A. It is greater.

Q. 29. Is that the same mark-up you testified about on those other pages?

A. Yes, sir.

Q. 30. Would you turn to page 4 of that inventory; look at that and tell whether or not those represent figures for wholesaler's cost?

A. Yes, sir, but there is a mistake in the total on this page, I think.

Q. 31. And do those represent wholesaler's cost on this page?

A. Each item, yes, sir.

Q. 32. What is the total given there?

A. The total given is \$12,860.06.

Q. 33. Do you know what the correct figure should be?

A. I'd say that the figure that has been marked out looks more like it.

Q. 34. What is that?

A. That's \$1277.66.

MR. BURNS: Your Honor please, we object because [fol. 387] it speaks for itself.

THE COURT: If there is some question arose about the figure, and Mr. West says it is incorrect, he says something looks like it is more correct. Add it up and see what the correct figure is. We don't want to guess about it.

Q. 35. Can you add it there, Mr. West?

A. If I had a pencil, it may be a little easier.

Q. 36. All right.

A. \$1277.66.

MR. BURNS: May we approach the Bench?

THE COURT: Yes, come up.

(Reporter's Note: The following proceedings were had at the Bench, out of the hearing of the Jury:)

MR. BURNS: Your Honor please, Mr. McIlwain and I have discussed this and if the Court, subject to our objections which we have heretofore stated concerning this inventory, we will stipulate that Mr. Geller and Mr. West gave these figures at the time the inventory was [fol. 388] made, and if they were called to testify, they would so testify.

THE COURT: That they gave these figures that are on this inventory, and were there present when the inventory was taken and that they are qualified to express an opinion as to the cost of the material.

MR. McILWAIN: That they would so testify.

THE COURT: That they would so testify. All right, gentlemen, doesn't that take care of it?

MR. BURNS: Right.

THE COURT: Now, are you moving to file it?

MR. SILER: Yes, I do.

THE COURT: All right. Let the objection be overruled and let Exhibit No. 27 be filed.)

(Reporter's Note: This concluded the proceedings had at the Bench.)

THE COURT: All right, Gentlemen, on the basis of [fol. 389] your stipulation, let Exhibit No. 27 be filed.

THE CLERK: Government's Exhibit No. 27 filed.

MR. SILER: You may ask him.

MR. BURNS: If Your Honor please, we have no questions.

* * * *

[fol. 392] The witness, C. BROWN WHITLEY, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SILER:

[fol. 393] Q. 1. State your name, please.

A. C. Brown Whitley.

Q. 2. Where do you live, Mr. Whitley?

A. Dayton, Ohio.

Q. 3. And what is your occupation?

A. Special Agent, Federal Bureau of Investigation.

Q. 4. How long have you been with the F.B.I.?

A. Approximately 8 years.

Q. 5. And where are you stationed?

A. In Dayton, Ohio.

Q. 6. Do you know either of the two defendants here on trial?

A. Yes, sir, I know the defendant, Thomas Smith.

Q. 7. Would you point him out, if you see him in the Court Room?

A. Yes, he is sitting at the end of the table next to the rail wearing the dark frame glasses.

MR. SILER: We ask that the record reflect that he indicated the defendant, Smith.

THE COURT: Let it so indicate.

Q. 8. Did there ever come a time when you had occasion to interview him?

[fol. 394] A. MR. BURNS: Object to ever come a time.

THE COURT: Overruled.

A. Yes.

Q. 9. And on what date was that?

A. September 1, 1970.

Q. 10. Where was that?

A. This was in an F.B.I. vehicle enroute from River-ville, Ohio, to Dayton, Ohio.

Q. 11. Was he under arrest at that time?

A. Yes, he was.

Q. 12. Did it have to do with the charges herein?

A. Yes.

Q. 13. Now before you interviewed him, was he advised of any rights?

A. Yes, he was.

Q. 14. Would you tell the Court and Jury what rights you advised him of on that occasion?

A. I advised Mr. Smith that he had the right to remain silent and not answer any questions, and that anything he said could be used against him in court. I also advised him that he was entitled to talk to a lawyer before answering any questions and that he could have a lawyer present with him when he answered questions if he so desired. I also advised him if he could not afford

[fol. 395] a lawyer that the government would appoint one for him. I told him additionally if he decided to answer questions without a lawyer being present, that he could stop at any time that he wished to do so.

Q. 15. After this, did he indicate whether or not he understood these rights?

A. Yes, he stated that he did understand these rights.

Q. 16. And after he said that, tell what conversation you had with him concerning this matter here.

MR. McILWAIN: Objection, if Your Honor please.

THE COURT: Well, the objection is sustained insofar as Count 2 of the indictment is concerned, and overruled insofar as Count 1 of the indictment is concerned.

Members of the Jury, you are not to consider any statement made by this witness with reference to the interview of the defendant, Smith, at a time when the defendant, Brown, was not present insofar as the charge against the defendant, Brown, may be concerned as it is set out in Count 2 of the indictment. You will be further instructed at the appropriate time with reference to the circumstances under which the results of the interview may be [fol. 396] considered as to Count 1 of the indictment. Of course, it may be considered as evidence in connection with the charge pending against the defendant, Smith, but not against the defendant, Brown, as to Count 2, because Brown was not present. It would be hearsay as to him as to Count 2 of the indictment.

All right, go ahead.

Q. 17. After he was advised of these rights, tell what he told you about this matter.

A. Mr. Simth stated that prior to his employment at Riverville, Ohio, he had been employed as a warehouseman at Central Jobbing Company in Cincinnati. He stated during June, 1970, another individual, who was also employed at Central Jobbing Company, one Joe Brown, had approached him and asked him to help steal merchandise from Central Jobbing Company and help him transport this merchandise to Manchester, Kentucky. He advised me that during June of 1970, he and Joe Brown made two trips to Manchester, Kentucky, with merchandise consisting of household goods and clothing

which they had stolen from Central Jobbing Company. He recalled that to the best of his knowledge that these dates were June 5th and 29th, 1970. He said that he and Mr. Brown had received approximately one-half the value of the stolen merchandise from the owners of the [fol. 397] Knuckles Discount Store in Manchester, Kentucky, and that the owners of the Discount Store knew that the merchandise was stolen. Mr. Smith stated further that he had received approximately \$2500.00 as his share of the money which they had received from the stolen merchandise.

Q. 18. Did he state whether or not other persons were involved in this theft?

A. He did, but he declined to name them.

MR. SILER: That's all. You may ask him.

MR. McILWAIN: Your Honor please, there is a motion to strike the testimony of the witness and admonish the jury to disregard it.

THE COURT: All right, approach the Bench, Gentlemen.

(Reporter's Note: The following proceedings were had at the Bench, out of the hearing of the Jury:)

THE COURT: Your motion to strike the testimony is overruled. Certainly it would be admissible as to both defendants as to Count 1 of the indictment, as I understand the rule.

I continue to be concerned about this matter, but I don't see any other way to handle it, and I have already ad-[fol. 398] monished the jury. I think the effect of my admonition was it would have to be considered in connection with Count 1 of the indictment under appropriate instruction and could be considered against defendant, Smith, but could not be considered against defendant, Brown, as to the charge embraced in Count 2 of the indictment. Isn't that the effect of my admonition?

MR. BURNS: Yes, sir; but Your Honor please, it is our contention that this testimony and the admonition and the law which apparently states it shall be this way has a devastating effect to the point that the substantial

rights of the defendants are prejudiced and amounts to denial of due process of law.

THE COURT: I don't see any other way it can be handled, Gentlemen, under the facts of this case, unless a severance could be granted as to Count 2 , and I overruled that motion at the start of the trial,—early in the trial,—in the first place the trial had already started, and I didn't think it was timely. I didn't think it was appropriate. I know of no other way to handle it unless you can show me some authority on it. Can you, Gentlemen?

[fol. 399] MR. BURNS: No, sir.

THE COURT: I think I have taken care of that. Didn't my charge take care of that?

MR. BURNS: Yes, sir.

THE COURT: All right.

* * * *

[fol. 468]

INSTRUCTIONS OF THE COURT

BY THE COURT:

Members of the Jury, at this time it becomes the responsibility of the Judge of the Court to charge the Jury as to the law of the case.

In the Federal Courts it is the right, the privilege, and sometimes the duty of the presiding Judge of the Court to comment upon the evidence. I do not know that I shall do that in this particular case to any appreciable extent or at all. But if I should, you are not to consider what I may say as being all the evidence, the most important evidence, or the most significant evidence upon any given point.

You, the jury, are the sole triers of the facts. These defendants and each of them are presumed innocent. That presumption starts with the defendants, continues with them throughout the trial of the case, and extends to every facet of the case. Before the defendants, or either of them, may be found guilty, the guilt of that defendant must be established beyond a reasonable doubt.

The term "reasonable doubt" means just what the words imply. A reasonable doubt is not some fleeting or inconsequential doubt. It is a doubt based upon reason. The United States is required to prove its case beyond a reasonable doubt. It is not required to prove its case [fol. 469] beyond all doubt. Very few matters are capable of proof to an absolute certainty.

The charge in this case is contained in the indictment, and as to these defendants it is embraced in Count 1 and Count 2, and it reads as follows:

COUNT 1.

THE GRAND JURY CHARGES:

Beginning on or about the 12th day of June, 1970, and continuing to and including the 28th day of August, 1970, in the Eastern District of Kentucky.

**JOSEPH EVERETTE BROWN
THOMAS DEAN SMITH and
CLINTON KNUCKLES**

named as defendants herein, willfully and knowingly did combine, conspire, confederate and agree together and with each other to violate Title 18, Sections 2314 and 2315, United States Code.

It was part of the same conspiracy that defendants, Joseph Everette Brown and Thomas Dean Smith, would steal merchandise from the warehouse of the Central Jobbing Company, Cincinnati, Ohio.

It was also part of the same conspiracy that defendants, Joseph Everette Brown and Thomas Dean Smith, would transport by rental van the merchandise stolen from Central Jobbing Company, Cincinnati, Ohio, to Knuckles Dollar General Store, Manchester, Kentucky, where such [fol. 470] merchandise would be knowingly received by defendant, Clinton Knuckles.

The Grand Jury charges that in furtherance of the aforesaid conspiracy, to accomplish the objects thereof, the defendants at the time and place hereinafter set forth did commit the following acts:

1. On or about June 12 and June 30, 1970, defendant, Joseph Everette Brown, did rent a U-Haul truck from Western Woods Humble Service Center, Cincinnati, Ohio.

2. On or about June 12 and June 30, 1970, defendants, Joseph E. Brown and Thomas Dean Smith, did steal a quantity of merchandise from Central Jobbers Company, Cincinnati, Ohio, and loaded it into a U-Haul truck.

3. On or about June 12 and June 30, 1970 defendants, Joseph Everette Brown and Thomas Dean Smith, utilized a U-Haul truck to deliver merchandise stolen from Central Jobbers Company, Cincinnati, Ohio, to Knuckles Dollar General Store, Manchester, Kentucky, a city in the Eastern District of Kentucky, where it was knowingly received by Clinton Knuckles.

4. On or about the 28th day of August, 1970, defendants, Joseph Everette Brown and Thomas Dean Smith, did steal a quantity of merchandise from Central Jobbers

Company, Cincinnati, Ohio, with the intent and for the purpose of transporting said merchandise to Manchester, [fol. 471] Kentucky, where it was to be received at the Dollar General Store by the operator of the store, defendant, Clinton Knuckles.

COUNT 2.

THE GRAND JURY FURTHER CHARGES:

Beginning on or about the 12th day of June, 1970, and continuing to and including the 28th day of August, 1970,

JOSEPH EVERETTE BROWN and
THOMAS DEAN SMITH

did transport from Cincinnati in the State of Ohio to Manchester in the Eastern District of Kentucky, stolen goods, wares and merchandise, that is, numerous case lots of general merchandise contained in cartons stamped "Central Jobbers Company," of a value of more than \$5,000.00 and they then knew the said merchandise to have been stolen."

Count 3 relates to the defendant, Clinton Knuckles, who is not now on trial. A severance has heretofore been granted as to the co-defendant, Clinton Knuckles who is named in the indictment herein. The defendants Joseph Everette Brown and Thomas Dean Smith, are on trial in this action, and the question for the consideration of the jury is the question of the guilt or innocence of the defendants, Joseph Everette Brown and Thomas Dean Smith, of the charges set out in Count 1 and Count 2 of the indictment.

[fol. 472] As to the offense charged in Count 1 of the indictment it is charged in the indictment that beginning on or about June 12, 1970, and continuing until on or about August 28, 1970, in the Eastern District of Kentucky, the defendants, Joseph Everette Brown and Thomas Dean Smith, agreed, combined, confederated and

conspired together to commit offenses against the United States as follows:

To violate Title 18, Sections 2314 and 2315, United States Code.

The objects of said conspiracy were to be accomplished as follows: That said Brown and Smith would steal merchandise from the warehouse of Central Jobbing Company, Cincinnati, Ohio, and would transport said stolen merchandise by rental van from Cincinnati, Ohio, to Knuckles Dollar General Store, Manchester, Kentucky, where such merchandise would be knowingly received by the co-defendant, Clinton Knuckles.

To effect the objects of said conspiracy the defendants allegedly committed divers overt acts, one of which was alleged to have been committed in the Eastern District of Kentucky; namely, the following:

"3. On or about June 12 and June 30, 1970, defendants, Joseph Everette Brown and Thomas Dean Smith, utilized a U-Haul truck to deliver merchandise stolen from Central Jobbers Company, Cincinnati, Ohio, to [fol. 473] Knuckles Dollar General Store, Manchester, Kentucky, a city in the Eastern District of Kentucky, where it was knowingly received by Clinton Knuckles," in violation of Title 18, Section 371, of the United States Code.

A conspiracy is a combination of two or more person, by concerted action, to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means. So a conspiracy is a kind of "partnership in criminal purposes," in which each member becomes the agent of every other member. The gist of the offense is a combination or agreement to disobey, or to disregard, the law.

Mere similarity of conduct among various persons, and the fact that they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy.

However, the evidence in the case need not show that the members entered into any express or formal agreement,

or that they directly, by words spoken or in writing, stated between themselves what their object or purpose was to be, or the details thereof, or the means by which the object or purpose was to be accomplished. What the evidence in the case must show beyond a reasonable doubt, [fol. 474] in order to establish proof that a conspiracy existed, is that the members in some way or manner, or through some contrivance, positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan.

The evidence in the case need not establish that all the means or methods set forth in the indictment were agreed upon to carry out the alleged conspiracy; nor that all means or methods, which were agreed upon, were actually used or put into operation; nor that all of the persons charged to have been members of the alleged conspiracy were such. What evidence in this case must establish beyond a reasonable doubt is that the alleged conspiracy was knowingly formed, and that one or more of the means or methods described in the indictment were agreed upon to be used, in an effort to effect or accomplish some object or purpose of the conspiracy, as charged in the indictment; and that two or more persons, including one or more of the accused, were knowingly members of the conspiracy as charged in the indictment.

One may become a member of a conspiracy without full knowledge of all the details of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not there- [fol. 475] by become a conspirator.

Before the jury may find that a defendant, or any other person, has become a member of a conspiracy, the evidence in the case must show beyond a reasonable doubt that the conspiracy was knowingly formed, and that the defendant or defendants, or other person who is claimed to have been a member, willfully participated in the unlawful plan, with the intent to advance or further some object or purpose of the conspiracy.

To act or participate willfully means to act or participate voluntarily and intentionally, and with the specific

intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, to act or participate with the bad purposes either to disobey or to disregard the law. So, if a defendant, or any other person, with understanding of the unlawful character of a plan, knowingly encourages, advises or assists, for the purpose of furthering the undertaking or scheme, he thereby becomes a willful participant—a conspirator.

One who willfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy.

In determining whether or not a defendant or defendants, or any other person, was a member of a conspiracy, [fol. 476] the jury are not to consider what others may have said or done. That is to say, the membership of a defendant, or any other person, in a conspiracy, must be established by the evidence in the case as his own conduct, what he himself willfully said or did.

Whenever it appears beyond a reasonable doubt from the evidence is the case that a conspiracy existed, and that a defendant was one of the members, then the statements thereafter knowingly made and the acts thereafter knowingly done, by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though th statements and acts may have occurred in the absence and without the knowledge of the defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy, and in furtherance of some object or purpose of the conspiracy.

Otherwise, any admission or incriminatory statement made or act done outside of court, by one person, may not be considered as evidence against any person who was not present and heard the statement made, or saw the act done.

In your consideration of the evidence in the case as to the offense of conspiracy charged, you should first determine whether or not the conspiracy existed, as alleged

[fol. 477] in the indictment. If you conclude that the conspiracy did exist, you should next determine whether or not the accused willfully became a member of the conspiracy.

If it appears beyond a reasonable doubt from the evidence in the case that the conspiracy alleged in the indictment was willfully formed; and that the accused willfully became a member of the conspiracy, either at the inception or beginning of the plan or scheme, or afterwards; and that thereafter one or more of the conspirators knowingly committed in furtherance of some object or purpose of the conspiracy, one or more of the overt acts charged; then the success or failure of the conspiracy to accomplish the common object or purpose is immaterial.

An "overt act" is any act knowingly committed by one of the conspirators, in an effort to effect or accomplish some object or purpose of the conspiracy. The overt act need not be criminal in nature, if considered separately and apart from the conspiracy. It may be as innocent as the act of a man walking across the street, or driving an automobile or using a telephone. It must, however, be an act which follows and tends toward accomplishment of the plan or scheme, and must be knowingly done in furtherance of some object or purpose of the conspiracy charged in the indictment.

[fol. 478] Five essential elements are required to be proved in order to establish the offense of conspiracy charged in the indictment:

First: That the conspiracy described in the indictment was willfully formed, and was existing at or about the time alleged;

Second: That the accused willfully became a member of the conspiracy;

Third: That one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment, at or about the time and place alleged; and

Fourth: That such overt act was knowingly done in furtherance of some object or purpose of the conspiracy, as charged.

In order for venue to attach in this case it is further incumbent upon the United States to prove:

Fifth: That the Overt Act No. 3 charged in Count 1 of the indictment was committed by the defendants since it is the only overt act alleged to have been committed within the Eastern Judicial District of Kentucky.

If the Jury should find beyond a reasonable doubt from the evidence in the case that existence of the conspiracy charged in the indictment has been proved, and that during the existence of the conspiracy one of the overt [fol. 479] acts alleged was knowingly done by one of the conspirators in furtherance of some object or purpose of the conspiracy, and that the overt act No. 3 charged in Count 1 of the indictment was committed within the Eastern Judicial District of Kentucky, then proof of the conspiracy offense charged is complete; and it is complete as to every person found by the jury to have been willfully a member of the conspiracy at the time the overt act was committed, regardless of which of the conspirators did the overt act.

As to Count 2 of the indictment, it is incumbent upon the United States to prove beyond a reasonable doubt the following essential elements of the offense:

First: That the defendants did transport from Cincinnati, Ohio, to Manchester, in the Eastern District of Kentucky, certain stolen goods, wares and merchandise as charged in Count 2 of the indictment.

Second: That said goods, wares and merchandise were at said time of the value of more than \$5,000.00.

Third: That at the time said goods, wares and merchandise were transported in interstate commerce as charged, if they were so transported, the defendants knew said goods, wares and merchandise had been stolen.

You will note that Count 1 of the indictment relates to an alleged conspiracy to violate the provisions of [fol. 480] 18 United States Code, Section 2314 and 18 United States Code, Section 2315; and Count 2 charges a violation of 18 United States Code, Section 2314.

18 United States Code, Section 2314 provides in part that: "Whoever transports in interstate commerce any goods, wares, merchandise, securities or money, of the

value of \$5,000.00 or more, knowing the same to have been stolen," shall be guilty of an offense against the United States.

18 United States Code, Section 2315 provides in part that: "Whoever receives any goods, wares, or merchandise, securities, or money of the value of \$5,000.00 or more, moving as, or which are a part of, or which constitute interstate commerce, knowing the same to have been stolen," shall be guilty of an offense against the United States.

The term "value" as used in the foregoing statutes, means the face, par or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, and money referred to in a single indictment shall constitute the value thereof.

"Market value" means the price a willing buyer would pay a willing seller at the time and place the property was alleged to have been stolen.

You will further note that the indictment charges in [fol. 481] each count that the offense was committed "on or about" a certain date. The proof need not establish with certainty the exact date of the alleged offenses. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the alleged offenses were committed on a date reasonably near the date alleged.

A defendant may be proven guilty by either direct or circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eye witness; circumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of a defendant. Further, the circumstances must not only be consistent with and indicative of guilt, but also be inconsistent with innocence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence: it requires only that the jury, after weighing all the evidence, must be convinced of the guilt of a defendant beyond a reasonable doubt before he can be convicted.

The Court instructs the jury that the fact that the defendants did not take the witness stand cannot be considered by you for any purpose and no inference what-

soever can be drawn against any defendant by reason of his failure to take the stand. The law gives every person charged with crime the absolute and unqualified privilege [fol. 482] of not testifying and the law further requires that no inference can be drawn by reason of such failure. The burden of proving a defendant guilty beyond a reasonable doubt is solely upon the Government.

The defendants did not testify in this case but this is their absolute right and privilege. You may not speculate on their reasons for failing to testify and you are to draw no inference against them because they did not take the stand.

You will note that the word "stolen" is used in the indictment herein.

Property is stolen which is taken without the knowledge or consent of the owner with the intent on the part of the person taking same to convert same to his own use and to permanently deprive the owner of his property therein.

You will note that before jurisdiction may attach in this case, there must be either a conspiracy to transport goods, wares, or merchandise of the value of more than \$5,000.00 as charged in Count 1 of the indictment, or there must be an actual transportation of such goods, wares or merchandise of the value of more than \$5,000.00 as charged in Count 2 of the indictment. However, as to both Count 1 and Count 2, it is not necessary that goods, wares, or merchandise of the value of more than \$5,000.00 [fol. 483] be transported at any one time so long as goods, wares or merchandise were transported within the approximate period embraced within the indictment and pursuant to a common scheme or plan and the total value thereof, if any were so transported, aggregated more than \$5,000.00.

However, transactions which are entirely separate and distinct cannot be grouped for the purpose of establishing a value, within the meaning of the subject statutes.

Now, Members of the Jury, the evidence in this case has been very simple. While this trial has taken some considerable period of time, I feel it would serve no useful purpose to review the evidence in any appreciable de-

tail. It has been gone into in some considerable detail by the attorneys, both for the defendants and for the United States.

The evidence for the United States is that the defendants entered into a conspiracy as charged in Count 1 of the indictment, and for the purposes therein set out, and pursuant to said conspiracy they committed the overt act set out in Count 1 of the indictment; and that they transported stolen goods in interstate commerce knowing the same to have been stolen as charged in Count 2 of the indictment. The United States contends that the evidence introduced here on its behalf shows that these [fol. 484] goods, wares and merchandise were of the value of more than \$5,000.00, and the United States contends from the evidence which has been introduced on its behalf and for the reasonable inference which may be drawn therefrom that the defendants are guilty of the charges set out in Count 1 and Count 2 of the indictment.

On the other hand, it is the position of the defendants the United States has failed to make out a case; that the evidence is insufficient to show a conspiracy; The evidence is insufficient to show that any stolen goods were transported in interstate commerce, or that the value thereof was of more than \$5,000.00; and that the United States has therefore failed to make out a case, and having so failed, the defendants are not guilty and that such a verdict should be returned by the jury.

These are the two conflicting versions of the affair. Basically the question for the consideration of the jury is which version is the correct one. Did the United States prove the charges set out in the two counts of this indictment beyond a reasonable doubt, or did it fail to do so? This is the question for the jury.

So if the jury believe from the evidence in this case beyond a reasonable doubt that: "Beginning on or about the 12th day of June, 1970, and continuing to and including the 28th day of August, 1970, in the Eastern [fol. 485] District of Kentucky, Joseph Everette Brown and Thomas Dean Smith, named as defendants herein, willfully and knowingly did combine, conspire, confederate and agree together and with each other to violate Title

18, Sections 2314 and 2315, United States Code," and that "It was part of the same conspiracy that the defendants, Joseph Everette Brown and Thomas Dean Smith, would steal merchandise from the warehouse of the Central Jobbing Company, Cincinnati, Ohio," and that "It was also part of the same conspiracy that defendants, Joseph Everette Brown and Thomas Dean Smith, would transport by rental van the merchandise stolen from Central Jobbing Company, Cincinnati, Ohio, to Knuckles Dollar General Store, Manchester, Kentucky, where such merchandise would be knowingly received by the co-defendant, Clinton Knuckles," and "that in furtherance of the aforesaid conspiracy, to accomplish the objects thereof, the defendants at the time and places hereinafter set forth did commit the following acts:

1. On or about June 12 and June 30, 1970, defendant, Joseph Everette Brown, did rent a U-Haul truck from Western Woods Humble Service Center, Cincinnati, Ohio.
2. On or about June 12 and June 30, 1970, defendants, Joseph E. Brown and Thomas Dean Smith, did steal a quantity of merchandise from Central Jobbers Company, Cincinnati, Ohio, and loaded it into a U-Haul truck.
- [fol. 486] 3. On or about June 12 and June 30, 1970, defendants, Joseph Exerette Brown and Thomas Dean Smith, utilized a U-Haul truck to deliver merchandise stolen from Central Jobbers Company, Cincinnati, Ohio, to Knuckles Dollar General Store, Manchester Kentucky, a city in the Eastern District of Kentucky, where it was knowingly received by Clinton Knuckles.
4. On or about the 28th day of August, 1970, defendants, Joseph Everette Brown and Thomas Dean Smith, did steal a quantity of merchandise from Central Jobbers Company, Cincinnati, Ohio, with the intent and for the purpose of transporting said merchandise to Manchester, Kentucky, where it was to be received at the Dollar General Store by the operator of the store, defendant, Clinton Knuckles," then you will find the defendants on trial guilty of the offense charged in Count 1 of the indictment. Otherwise, you will find said defendants not guilty of the offense charged in Count 1 of the indictment.

Similarly as to Count 2 of the indictment; if the jury believe from the evidence in this case beyond a reasonable doubt that: "Beginning on or about the 12 day of June, 1970, and continuing to and including the 28th day of August, 1970, Joseph Everette Brown and Thomas Dean Smith did transport from Cincinnati in the State of Ohio Manchester in the Eastern District of Kentucky, stolen goods, wares and merchandise; that is, numerous case lots [fol. 487] of general merchandise contained in cartons stamped "Central Jobbers Company," of a value of more than \$5,000.00 and they then knew the said merchandise to have been stolen," then you will find said defendants guilty of the offense charged in Count 2 of the indictment. Otherwise, you will find said defendants not guilty of the offense charged in Count 2 of the indictment.

A unanimous verdict is required; that is to say, each juror must agree to any verdict returned by the jury. You should elect one of your number foreman. The foreman should sign the verdict on behalf of the jury when you have arrived at your verdict in the case.

We have prepared for your use in this case a form of verdict to be used when you have arrived at your verdict in this case. It reads in part as follows:

" UNITED STATES DISTRICT COURT
for the
EASTERN DISTRICT OF KENTUCKY
LONDON

No. 14,667

UNITED STATES OF AMERICA

v.

JOSEPH EVERETT BROWN
THOMAS DEAN SMITH

"We, the jury, find"

and then there is a blank to be filled in when you have arrived at your verdict. On the lower left hand side of

[fol. 488] the form of verdict appears a line; underneath that line appears the word "Date"; immediately above the line are the words and figures "January 1971"; in the lower right hand side of the form appears another line, and underneath that line appears the word "Foreman." When you have arrived at your verdict in the case, this form of verdict should be filled in here in the body in accordance with the finding of the jury, dated and signed by the foreman of the jury. It should be in substantially the following form: Either "We, the jury, find the defendants guilty" or "We, the jury, find the defendants not guilty." This is the province of the jury.

As I have heretofore indicated to you, the defendants, Joseph Everette Brown and Thomas Dean Smith, are on trial here on the charges contained in Count 1 and Count 2 of the indictment. The verdict returned by the jury should reflect the finding of the jury as to each of those defendants as to each of the counts referred to; that is, Count 1 and Count 2. You may find both defendants guilty on the charge contained in Count 1 of the indictment, or you may find both defendants not guilty of the charge contained in Count 1 of the indictment, or you may find one defendant guilty of the charge contained in Count 1 of the indictment and the other defendant not guilty of the charge contained in Count 1 of the indictment. Similarly as to Count 2 of the indictment. You [fol. 489] may find both defendants guilty of the charge contained in Count 2 of the indictment, or you may find both defendants not guilty of the charge contained in Count 2 of the indictment, or you may find one defendant guilty of the charge contained in Count 2 of the indictment and the other defendant not guilty on the charge contained in Count 2 of the indictment.

Again, this is the province of the jury; but the verdict returned by the jury should reflect the finding of the jury with respect to each of the defendants as to each of the two counts on trial here; that is, Count 1 and Count 2 of the indictment.

THE COURT: Are there any objections or exceptions to the charge?

MR. SILER: None by the United States, Your Honor.

MR. McILWAIN: Defense has none, Your Honor please.

* * * *

[fol. 495] **THE CLERK:** "We, the Jury, find both defendants guilty on Counts 1 and 2."

/s/ Robert Hiram Stanton
Foreman."

* * * *

[fol. 497] **THE COURT:** All right, in the case of United States vs. Brown and Smith, let counsel have seats at the defense table, and let the record show the defendants and their counsel are present in the Court Room and the attorney for the United States is present in the Court Room.

Mr. McIlwain, I note that Mr. Burns is not present, who was associated with you as co-counsel. Are you ready to proceed?

MR. MCILWAIN: We are ready to proceed, Your Honor.

THE COURT: Are the defendants, Smith and Brown, ready to proceed without the presence of co-counsel, Burns?

(Reporter's Note: Both defendants indicated "Yes.")

THE COURT: Gentlemen, you are nodding your head. Let's get it in the record.

MR. BROWN: Yes.

[fol. 498] **MR. SMITH:** Yes.

THE COURT: All right, is the United States ready to proceed?

MR. SILER: The United States is ready, Your Honor.

THE COURT: All right, let the defendants come around, please.

Mr. Brown and Mr. Smith, you were each indicted by the Grand Jury charged with the offense of Conspiracy in Count 1 of the indictment, and with the offense of transporting stolen property in interstate commerce in Count 2 of the indictment. You appeared with your attorneys and entered a plea of not guilty to the charges contained in the indictment. Thereafter, a Jury was empaneled to hear your case, and the Jury having heard the evidence in the case, the arguments of counsel and the instructions of the Court, retired to consider the case and subsequently returned into Court a verdict finding each of you guilty of the charges contained in Count 1 and Count 2 of the indictment.

I desire to ask you now if either of you, or your attorney, have anything you wish to say before the judg-

[fol. 499] ment of the Court is pronounced in your case, or it either of you have any legal cause to show why the judgment of the Court should not be pronounced in your case.

MR. McILWAIN: If Your Honor please, on their behalf, I would like to make some remarks.

THE COURT: Yes, sir, Mr. McIlwain.

MR. McILWAIN: First, in reference to Mr. Smith. Mr. Smith is 37 years old, married, he has four children, two of them are adopted. One is 14, and one is 9. He has a child 7 years old in Middlesboro, which he has been supporting for some time, at \$50.00 a week. I understand from him, and believe to be true, that his payments are up to date. He has a six year old baby in Cincinnati—I mean, a six day old baby, I meant to say. The day after he left—when he got out on bond in Cincinnati, and the day he was fired, he secured a job up near Dayton where he has been employed since that time at the Vindale Corporation—a mobile homes concern. He makes approximately \$125.00 on an average a week. At the time he was employed with the Central Jobbing Company, he was making approximately \$65.00 or \$75.00 a week, and as Your Honor knows, from having heard this evidence, he has shown certainly, to me, remorse, and I believe from [fol. 500] the fact that he made the two statements that he made, it shows it was helpful in breaking this case. As a matter of fact, there would have been, probably no case insofar as the Federal Court is concerned had not Mr. Smith volunteered the information which he did to the Hamilton County Sheriff and to the F.B.I.

I believe I started out with he has never been arrested on any charge, and I believe that he would be a good subject for probation, if Your Honor please, and I believe I would like to recommend that to the Court on his behalf.

THE COURT: All right, anything on behalf of the defendant Brown?

MR. McILWAIN: The defendant, Brown, if Your Honor please, is 38 years old. He has been in trouble before in Virginia in 1960. It was for a check, I believe, as well as I remember. He is married. He had twin

children that's just about 4 years old. His wife also has a baby that's five months old.

After he was discharged as a result of this involvement at the Central Jobbing Company, he secured employment with Stearn and Foster in Cincinnati—Stearn and Foster Company in Cincinnati. He has—from dealing with me, [fol. 501] I know that he is remorseful; he is sorry he broke the trust that had been placed in him by Mr. Geller.

And, I might say, if Your Honor please, that both of them chose, on their own accord, not to take the witness stand, and one of the reasons is they did not want to mislead this Court, or prejure themselves in front of this Court; that the facts that were heard here were not such that they could contradict them.

I might add, also, if Your Honor please, on Mr. Brown's behalf, that this is not a crime of violence. It is a crime, of course, but it's such that involved the making of some money, and I believe in his case that he would warrant serious consideration for probation. And, from 1960 until his involvement in this case, he was regularly employed, supported his family, and was trying to do what was right.

THE COURT: All right, anything either one of the defendants wish to say personally? Mr. Smith?

MR. SMITH: No.

THE COURT: Mr. Brown?

MR. BROWN: No.

[fol. 502] THE COURT: All right, let me look at the pre-sentence report.

(Reporter's Note: At this time there was a short pause in the proceedings while the Court examined the pre-sentence report).

THE COURT: Well, I note here Mr. Brown, on February 17, 1950, offense, Military Offense, United States Army Court Martial, 2 years. It appears that that was served at the U.S. Disciplinary Barracks, Ft. Leavenworth, Kansas, and it was for misappropriation of Government property. The original sentence was 10 years, reduced to 2 years.

May 4, 1953, auto theft, State of Washington, 10 years. Convicted under the name of Monroe Dominguez.

August 5, 1954, Investigation as Antonio Dominguez, Police Department, St. Louis, Missouri, released.

November 5, 1954, suspicion of Larceny, Police Department, St. Louis, Missouri, no disposition given.

October 18, 1961, eleven separate cases of forgery, State Court, Portsmouth, Virginia, 2 years on each count, with some to be served concurrently, an aggregate sentence of 6 years.

[fol. 503] Now, I note here Mr. Smith apparently has no previous record. At least, there's nothing indicated to the Court. But, I further note that he formerly lived in the Middlesboro area.

This is a most serious case, Gentlemen. I find the situation in this country may be approaching a state where the only property that a man can have is what he can keep his eye on, and I just don't find any excuse for theft in any form, and, particularly in this character of theft. I can't understand why a man with Mr. Brown's record would have been given, as the employer testified here, the keys to the warehouse—the keys to the business. I can't understand that. Of course, he has served those previous sentences. I certainly wouldn't give the keys to my property to a man with a record of that kind. He may have been wholly reformed, but that's up to them.

The evidence here was clear. The defendants were convicted, and this man, Brown, has a quite serious record. Mr. Smith, apparently, had no record, but they were in it together. I don't see how I can make a difference in the sentence, and I can't put a thief on probation—just out and out thief. It's painful, but the record here indicates that somebody has been stealing from this man for some considerable period of time vast sums of money, vast sums [fol. 504] of property, and if the evidence was clear that they had taken it all, I would have to consider a maximum sentence in regard to both counts. But, I don't see how I can make any difference in the sentence, and I don't think the sentence of Mr. Brown, regardless of his record,—he's served that previous sentence, but I can't put these men on probation, either one of them.

I just continue to be concerned about the incidents of stealing and thieving—we had a man here the other day that was convicted of stealing somebody's cattle, and every farmer who goes to sleep is at the mercy of any thief that wants to steal his cattle, because all it takes is a pair of pliers to cut the fence, and a truck, and twenty minutes unobstructed efforts to get a load of cattle loaded up. But, that's not the circumstance here, but it just continues to increase. Almost a million automobiles stolen in the United States last year. I don't know how this stuff found its way down to Manchester. I know it found its way down there in this truck, but I don't know what the contact was, or how it was arranged. These men were stealing it, and transporting it. They have been convicted, and the evidence was overwhelming, and I just can't put anybody with that character of record on probation—that character of offense,—I don't care what the circumstances were, hardly. It's just regrettable.

[fol. 505] I have tried to think about what sentence should be imposed in this case ever since the jury returned its verdict.

It's the judgment of the Court that the defendants, and each of them, be committed to the custody of the Attorney General of the United States for a period of five (5) years upon the charge contained in Count 1 of the indictment, and that each of the defendants be committed to the custody of the Attorney General of the United States for a period of five (5) years upon the charge contained in Count 2 of the indictment, the sentences imposed in Count 1 and Count 2 of the indictment to be served concurrently.

Now, Gentlemen, it's my duty to advise you that, as you were tried by a jury and found guilty, that you each have a right to an appeal. If you are unable to defray the costs of an appeal you may be permitted to appeal in forma pauperis upon making a proper showing to the Court in that regard.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 71-1188

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

JOSEPH EVERETTE BROWN AND THOMAS DEAN SMITH,
DEFENDANTS-APPELLANTS.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF KENTUCKY.

Decided and Filed December 20, 1971.

BEFORE: EDWARDS, MCCREE, AND MILLER, CIRCUIT JUDGES.

MCCree, Circuit Judge. We consider appeals from convictions of conspiracy to steal merchandise of the value of \$5,000.00 or more, to transport it in interstate commerce and to conceal it, and of the substantive offense of transporting the goods from Ohio to Kentucky knowing them to have been stolen, in violation of 18 U.S.C. §§ 2314 and 2315. Appellants had been indicted in a three-count indictment which charged (1) that Brown, Smith, and one Clinton Knuckles conspired from June 12 through August 28, 1970, that Brown and Smith would steal merchandise from the warehouse of the Central Jobbing Co., Cincinnati, Ohio, and transport it to Manchester, Kentucky, where it would be knowingly received by Knuckles; (2) that Brown and Smith transported the merchandise; and (3) that Knuckles knowingly received and concealed it. Without objection, Knuckles' trial was severed from that of appellants. A jury convicted both appellants, who received identical concurrent five year sentences on each of the first two counts.

The appeal presents issues concerning the admission against Smith and Brown of evidence seized at Knuckles' store pursuant to an illegal search warrant, and of the admission of the portions of the confessions of Brown and

Smith in which each incriminated the other although neither elected to testify. Appellants contend that the cautionary instruction limiting to the conspiracy count the applicability of the part of each confession which incriminated the other defendant was erroneous, and, if correct, was incapable of eliminating the prejudicial effect.

We determine that no error was committed in the admission against appellants of the evidence seized under the illegal search warrant. Although we agree that the District Court violated the teaching of *Bruton v. United States*, 391 U.S. 123 (1968), in admitting the confessions, we affirm because the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967); *Harrington v. California*, 395 U.S. 250 (1968). This determination requires us to set forth the evidence in somewhat greater than usual detail.

Appellants were employed by Central Jobbing Co., a Cincinnati-based business enterprise which operated 12 retail outlets in Ohio, Kentucky, and Virginia where it sold bargain-priced clothing, shoes and housewares. It also sold to independent retailers. The central warehouse in Cincinnati was managed by appellant Brown who was entrusted with keys to the building. Smith was a truck driver. The business had experienced losses of about \$60,000 attributed to pilferage during each of the two years immediately prior to 1970, and many employees were under suspicion. About August 18, 1970, Central Jobbing's supervisor retrieved a slip of paper that Brown had dropped from his pocket and discovered that it was a list of warehouse merchandise with prices juxtaposed at about ten percent of wholesale costs. The total inventory listed and priced by Brown in this manner amounted to \$2,200.00. The supervisor estimated that the lowest total wholesale price for these items would have been about \$6,400.00, and that the market price, about \$10,000. The list was turned over to the company president and the Hamilton County Police were advised. Surveillance of the warehouse was established that same day, and, shortly after 4:00 p.m., Hamilton County Sheriff's officers observed Brown and Smith wheeling two-wheeled

carts loaded with merchandise from the warehouse to a U-Haul van which Brown had rented. A sheriff's officer took photographs of both appellants as they were so engaged. At about 5:00 p.m. they completed the loading and drove away only to be arrested after having traveled a short distance from the warehouse premises. Each was advised of his constitutional rights concerning custodial interrogation, and each confessed fully that he had stolen these wares and others on prior occasions and had transported them to Knuckles' Dollar Store in Manchester, Kentucky. Mr. Giller, Central's President, was called to the scene of the arrest and determined that the goods had a value of \$6,500.00.

Advice of this arrest was telephoned to the Kentucky State Police and the Federal Bureau of Investigation in Kentucky, and both agencies were told that Knuckles' Dollar Store had been identified as the outlet for the stolen merchandise. Manchester, Kentucky, police officers then recalled that on prior occasions in June and July 1970, they had observed men, whom they later identified as Brown and Smith, unload cartons from a U-Haul truck at Knuckles' emporium after midnight. FBI Agent George Alff entered Knuckles' store and saw several boxes, in plain view, bearing a Central Jobbers Co. stencil. Later a search was made pursuant to a search warrant which was invalid. The issuing Manchester City Police Judge had signed the warrant in blank without observing whether "there was anybody's name on the affidavit or not" and had not administered an oath to the affiant. This search produced a quantity of Central Jobbers merchandise sufficient to fill two forty foot moving vans. Its retail value was estimated at exceeding \$100,000.

Knuckles' motion to quash the fruits of this search was granted but that of appellants was denied. This ruling was correct because appellants claimed no possessory or proprietary rights in the goods or in Knuckles' store, and it is clear that they cannot assert the Fourth Amendment right to another. *Alderman v. U. S.*, 394 U.S.165 (1969); *U. S. v. Wells*, 437 F.2d 1144 (6th Cir. 1971).

The foregoing evidence was uncontroverted and would appear to establish the classical open-and-shut case, but,

inexplicably, the United States Attorney insisted on introducing the portions of each appellant's confession which implicated the other, contrary to the teaching of *Bruton v. United States* (*supra*). Thus, the District Court was required to make the ruling which presents the only substantial issue on appeal.

The court was aware of our ruling in *Campbell v. United States*, 415 F.2d 356 (1969), that admission of statements which fall within the co-conspirator exception to the hearsay rule does not deny the Sixth Amendment right of confrontation and cross-examination, and ruled the jury could not consider these statements "as to the charge contained in Count 2 [the substantive offense] of the indictment."

Objection was made on the ground that there had been no showing that the statements were made to promote the objects of the conspiracy, but the court required only a showing of the existence of the conspiracy as a predicate for admissibility.¹ Accordingly, the admission of the cross-inculcating declarations violated both the hearsay rule and *Bruton* with reference to both counts of the indictment.

Nevertheless, we have concluded that the proof of guilt is so overwhelming that the error was harmless. As the opinion of the Court recited in *Harrington v. California*, 395 U.S. 250 (1969), "[i]t is so overwhelming that unless we say that no violation of *Bruton* can constitute harmless error, we must leave this . . . conviction undisturbed."

Affirmed.

¹ MR. McILWAIN:

Where there is a conspiracy, don't you contemplate statements by conspirators in the furtherance of the conspiracy rather than a confession made at a later time after the conspiracy has ended?

THE COURT:

I think once they showed conspiracy, that any matter that's relevant would be admissible, assuming all other requirements of competency are met, because this is the way these things are. Gentlemen, I believe that's what the case law requires.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 71-1188

Filed Dec. 20, 1971, James A. Higgins, Clerk

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,
vs.

JOSEPH EVERETTE BROWN AND THOMAS DEAN SMITH,
DEFENDANTS-APPELLANTS.

Eastern District of Kentucky

Filed Jan. 13, 1972, Davis I. McGarvey, Clerk, U.S.
District Court

BEFORE: EDWARDS, MCCREE AND MILLER, CIRCUIT JUDGES.

APPEAL from the United States District Court for
the Eastern District of Kentucky

THIS CAUSE came on to be heard on the record from
the United States District Court for the Eastern District
of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here
ordered and adjudged by this Court that the judgment of
the said District Court in this cause be and the same is
hereby affirmed.

No costs awarded inasmuch as this appeal is In Forma
Pauperis.

Entered by order of the Court

JAMES A. HIGGINS
Clerk

Issued as Mandate: January 11, 1972

COSTS: None

Filing fee \$ _____

Printing \$ _____

Total \$ _____

A True Copy.

Attest:

/s/ James A. Higgins

JAMES A. HIGGINS, Clerk

Copies to:

Judge Moynahan

U.S. Atty

1-14-72

MRW

SUPREME COURT OF THE UNITED STATES

No. 71-6198

JOSEPH EVERETTE BROWN AND THOMAS DEAN SMITH,
PETITIONERS,

v.

UNITED STATES

On petition for writ of Certiorari to the United States
Circuit Court of Appeals for the Sixth Circuit.

On consideration of the motion for leave to proceed
herein in forma pauperis and of the petition for writ of
certiorari, it is ordered by this Court that the motion to
proceed in forma pauperis be, and the same is hereby,
granted; and that the petition for writ of certiorari be,
and the same is hereby, granted.

June 26, 1972

IN THE

SER 112
MICHAEL RODAK, J.

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6193

JOHN EVERETT BROWN and
THOMAS DEAN SMITH,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONERS

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6193

**JOHN EVERETT BROWN and
THOMAS DEAN SMITH,**

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

BRIEF FOR PETITIONERS

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. pp. 243-246), reported at 452 F.2d 868 (1971).

JURISDICTION

The judgment of the Court of Appeals was entered on December 20, 1971. A petition for rehearing was not filed.

The petition for a writ of certiorari was filed on February 17, 1972; it was granted on June 26, 1972 (App. 249). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Wherein a conspiracy trial, upon joint motion to quash a search warrant and to suppress the evidence obtained thereby, the search warrant is quashed because it and the supporting affidavit were signed in blank by the affiant and the issuing judge, was it error for the Court to hold that two co-conspirators had no standing to suppress the evidence seized under the search warrant because they did not have any possessory interest in either the premises that were searched or the property that was allegedly procured by reason of the search?

2. In a conspiracy trial where neither of two defendants testified, did the Court commit reversible error by admitting the confessions of each defendant, each of which incriminated his codefendant, when the confessions were made to police officers after the arrest of both defendants and the confessions were not made by the defendants in one another's presence, and after the conspiracy had terminated?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioners were convicted upon an indictment charging them with having conspired together and with a co-defendant, Clinton Knuckles, to steal merchandise in Cincinnati, Ohio and transport same to Manchester, Kentucky, in violation of 18 U.S.C. 371; and of the substantive offense of transporting stolen merchandise from Cincinnati, Ohio to Manchester, Kentucky, in violation of 18 U.S.C. 2314.

On February 1, 1971, the petitioners were sentenced to five years imprisonment on each Count with the sentences to run concurrently (App. 238). The Court of Appeals affirmed (App. 243-246).

1. Prior to trial the defendants filed motions to suppress all evidence obtained as a result of the search warrant issued by the police court of the City of Manchester, Kentucky. At the hearings upon motion to suppress it developed that on August 29, 1970 J.M. Shelton, City Police Judge (App. 13) signed a search warrant in blank and it was filled in later by the County Attorney. The affidavit in support of the search warrant

which was at sometime signed by one William West, was not signed nor sworn to before the Police Court Judge (App. 15-16).

The County Attorney, Charles Smith, testified that when Judge Shelton signed the affidavit and search warrant neither had been completed or filled out (App. 19).

The assistant United States Attorney conceded to the Court that the affidavit and search warrant were "not worth the paper they were written upon", and that it would be futile, useless and very aggravating for him to argue otherwise. The court agreed that they were not worth the paper they were written upon (App. 29). The court sustained the motion to suppress, "to the extent that it seeks to quash the affidavit and search warrant and any search required to be and made thereunder" (App. 30).

Federal, State and local officers armed with the "worthless" search warrant proceeded on the Saturday afternoon in question to the Knuckles Dollar Store. The search warrant was read to the defendant, Clinton Knuckles (App. 56) while the store was open and customers were in it (App. 57). Fifteen or twenty minutes thereafter the customers were gotten out and the store was closed (App. 78). The search continued until at least 11:00 or 12:00 o'clock that night in both the public and private portions of the store (App. 64). Local officers were posted to guard the store during the night and they returned and continued to search, seize, take, and inventory merchandise the next day, Sunday, August 30, 1970 (App. 67) until 9:30 or 10:00 o'clock at night (App. 69). During the course of the search and seizure, almost two moving vans full of merchandise was taken from the premises (App. 68).

With regard to the petitioners, Brown and Smith, who were arrested in Cincinnati, Ohio and were in custody during the time while the search and seizure was being carried on at the Knuckles Dollar Store in Manchester, Kentucky (App. 122), the trial court was of the opinion, and so ruled, that neither had standing to have suppressed the evidence seized at Knuckles Dollar Store; that they did not have any possessory interest in either the property that was searched or the property that was seized by reason of the search (App 109).

2. The government's evidence upon the trial relating to the confessions obtained from the petitioners shows that almost immediately upon the subject of confessions being mentioned, counsel for petitioners objected to the introduction of any statement of one petitioner made out of the presence of the other (App. 124), and the defense attorneys made specific reference to *Bruton v. United States*, 391 U.S. 123.

The Court reasoned in overruling the objection that *Campbell v. United States*, 6th Cir., 415 F.2d 356 decided since *Bruton*, laid down the rule that *Bruton* does not apply in cases of conspiracy (App. 124). Whereupon, counsel inquired of the Court as to how the conspiracy count of the indictment could be separated from the substantive charges (App. 124). The Court then stated that the only way he could take care of that problem would be by either an admonition to the jury or in his instructions to the jury, or perhaps both. The Court further stated, "of course, obviously any statement made by a co-defendant out of the presence of the [other] defendant would not be admissible as to Count Two [which is the substantive count charging interstate shipment of stolen merchandise]" (App. 124).

Petitioners' counsel then asked the Court to grant a severance as to Counts One and Two of the indictment (App. 125); which was overruled upon the grounds that the motion was not timely (App. 127).

Detective, Raymond Hulin, of Hamilton County, Cincinnati, Ohio, (App. 118), in relating to the jury the confession which he elicited from the petitioner, Thomas Dean Smith, stated that on previous occasions when he, Smith, had taken merchandise from his employer's warehouse to Knuckles Dollar Store in Manchester, Kentucky, that he had been accompanied by his co-defendant and co-conspirator, the petitioner, Joseph Everett Brown (App. 128-129). Objection was immediately made on behalf of the petitioner, Brown, and a motion was made to strike the testimony referring to Brown (App. 129).

The Court then ruled that the motion was sustained as to Count Two of the indictment, because the statement would be hearsay as to the co-defendant, Brown; but the law was otherwise as to Count One of the indictment [the conspiracy count], and he indicated that he would take care of that in the instructions at the time he instructed the jury; because that evidence was not to be considered against the petitioner, Brown, as to Count Two of the indictment [the substantive count or interstate theft] (App. 130).

At various times during the giving of this testimony, upon objection by the petitioner, Brown, the Court admonished the jury to not consider references made to him as they related to Count Two of the indictment only (App. 134, 135, 137, 138, 139, 140, 141, 142).

Detective Hulin also interviewed the petitioner, Joseph Everett Brown, out of the presence of the other

petitioner, Thomas Dean Smith, (App. 144). In relating the confession obtained from Brown to the jury, Detective Hulin testified that Brown said that he had previously taken merchandise from his employer's warehouse to Knuckles Dollar Store in Manchester, Kentucky and that on these trips he had been accompanied by the petitioner, Smith (App. 146).

The same objection was made to this testimony by the petitioner, Smith, and the Court gave the same admonition to the jury (App. 147).

Neither of the petitioners testified.

3. The Sixth Circuit determined that no error had been committed in the admission against the petitioners of the merchandise illegally seized in Knuckles Store because the petitioners claimed no possessory nor proprietary right in the goods or in Knuckles Store, placing its reliance upon *Alderman v. U.S.*, 394 U.S. 165 (1969); and *U.S. v. Wells*, 437 F.2d 1144 (6th Cir. 1971).

With regard to permitting the confession of each petitioner to be introduced implicating or incriminating the other petitioner, the Sixth Circuit found that the district court violated the teaching of *Bruton v. United States*, 391 U.S. 123 (1968), in admitting the confessions, but upon the authority of *Chapman v. California*, 386 U.S. 18 (1967); and *Harrington v. California*, 395 U.S. 250 (1968), affirmed the judgment "... because the error was harmless beyond a reasonable doubt." (App. 243-244).

4. The District Court, without objection, (App. 237) gave the following relevant instructions to the jury:

[fol. 472] "As to the offense charged in Count 1 of the indictment it is charged in the indictment that beginning on or about June 12, 1970, and continuing until on or about August 28, 1970, in the

Eastern District of Kentucky, the defendants, Joseph Everett Brown and Thomas Dean Smith, agreed, combined, confederated and conspired together to commit offenses against the United States...." (App. 225-226).

* * * * *

"A conspiracy is a combination of two or more persons by concerted action, to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means. So a conspiracy is a kind of "partnership in criminal purposes," in which each member becomes the agent of every other member. The gist of the offense is a combination or agreement to disobey, or to disregard the law." (App. 226).

* * * * *

"In determining whether or not a defendant or defendants, or any other person, was a member of a conspiracy, [fol. 476] the jury are not to consider what others may have said or done, that is to say, the membership of a defendant, or any other person, in a conspiracy, must be established by the evidence in the case as his own conduct; what he himself willfully said or did.

"Whenever it appears beyond a reasonable doubt from the evidence is the case that a conspiracy existed, and that a defendant was one of the members, then the statements thereafter knowingly made and the acts thereafter knowingly done, by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the statements and acts may have occurred in the absence and without the knowledge of the defendant, provided such statements and acts were knowingly made and done during the continuance

of such conspiracy, and in furtherance of some object or purpose of the conspiracy.

"Otherwise, any admission or incriminatory statement made or act done outside of court, by one person, may not be considered as evidence against any person who was not present and heard the statement made, or saw the act done." (App. 228).

ARGUMENT

I

With regard to the question of standing by the petitioners to object to the unlawful search and seizure of property from Knuckles Dollar Store, it should be borne in mind that substantially all evidence allegedly in Knuckles possession was introduced to convict the petitioners of conspiracy to transport stolen goods in interstate commerce.

In connection with the conspiracy count, the Court instructed the jury that a conspiracy is a "partnership in criminal purposes" in which *each member becomes the agent of every other member* (App. 226); and that whenever it appears beyond a reasonable doubt that a conspiracy existed and that the defendant was one of the members, "... the *acts* thereafter knowingly done, by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the statements and *acts* have occurred in the absence and without the knowledge of the defendant. . ." (App. 228).

In *Territory v. Goto*, 27 Hawaii 65, it was stated that in the eyes of the law conspirators are one man, they breathe one breath, they speak one voice, they wield one arm, and the law says that the acts, words and declarations of each, while in the pursuit of the common design, are the words and declarations of all.

That a conspiracy is a partnership in crime is well recognized. *Fishwick v. United States*, 329 U.S. 211, 216; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253; *Pinkerton v. United States*, 328 U.S. 639, 644. The act of one partner in crime is admissible against the others where it is in furtherance of the criminal undertaking. *Fishwick v. United States*, 329 U.S. 211, 217; *Logan v. United States*, 144 U.S. 263, 309; *Brown v. United States*, 150 U.S. 93. So long as the partnership in crime continues, the partners act for each other in carrying it forward. It is settled that "an overt act of one partner may be the act of all without any new agreement specifically directed to that act." *Pinkerton v. United States*, 328 U.S. 639, 646; *United States v. Kissel*, 218 U.S. 601, 608. The motive or intent may be proved by the acts or declarations of some of the conspirators in furtherance of the common objective. All members are responsible, although only one did the act; or, stated differently, in the law of conspiracy the overt act of one partner in crime is attributable to all. *Wiborg v. United States*, 163 U.S. 632, 657; *Pinkerton v. United States*, 328 U.S. 639, 647.

Thus in conspiracy matters we have incorporated into it the law of agency and vicarious responsibility. It must be conceded that the defendant and co-conspirator, Clinton Knuckles, in Manchester, Kentucky, was the agent, servant, and employee of the petitioners, Smith and Brown; and that as such he was acting within the scope of his partnership or agency. It is a fair statement of law that the general rules of law applicable to agents likewise apply to partners. *Irwin v. Williar*, 110 U.S. 499.

The Uniform Partnership Act, sec. 9(1), provides in part that every partner is an agent of the partnership for the purposes of its business, and the act of every partner

binds the partnership. Section 6(1) of that act provides that a partnership is an association of two or more persons to carry on as co-owners a business for profit. And Section 8(1) provides that all property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, [stealing or theft], on account of the partnership, is partnership property.

Therefore, if we apply the legal principal that conspiracy is a partnership crime, we must look to the law pertaining to partnership property. By definition the petitioners, Smith and Brown, held title or an interest in and to the partnership property which was unlawfully found and seized in Knuckles Store in Manchester, Kentucky. While Smith and Brown did not have actual possession of the seized property, their possession, as partners with Knuckles, was, to say the least, constructive. If to possess the goods found in Knuckles Dollar Store is an "act" within the meaning of that term as used in the law and the District Court's instructions to the jury, and that possession is an overt act and attributable to Knuckles, then his possession thereof must also be attributable to Smith and Brown.

If the foregoing has any validity in law or reason, then the petitioners, Smith And Brown, have standing as persons aggrieved by an unlawful search and seizure to have the evidence seized from Knuckles Store suppressed.

The legal fictions which have been developed and enunciated for conspiracies fulfill the "tendency of a principle to expand itself to the limit of its logic." *Krulewitch v. United States*, 336 U.S. 440, concurring opinion of Jackson, Jr., ["the phrase is Judge Cardozo's—Nature of Judicial process, P. 51"] And presumptions and legal fictions should cut both ways for the prosecution as well as the defendant.

In *Jones v. United States*, 362 U.S. 257, 258, possession was the basis of the government's case against petitioner for violating the laws against narcotics. The Government challenged petitioner's standing to have suppressed the narcotics found in a friend's apartment where petitioner was staying at the time because he alleged neither ownership of the seized articles nor an interest in the apartment greater than that of an "invitee or guest". The district judge denied his motion to suppress because he had no standing.

This Court's reasoning there is equally persuasive and apposite to this case when it stated that:

"... to hold the petitioner's failure to acknowledge interest in the narcotics on the premises prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction. Petitioner's conviction flows from his possession of the narcotics at the time of the search. Yet the fruits of that search, upon which the conviction depends, were admitted into evidence on the ground that petitioner did not have possession of the narcotics at that time. The prosecution here thus subjects the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government. The possession on the basis of which petitioner is to be and was convicted suffices to give him standing under any fair and rational conception of the requirements of Rule 41(c)."

Here the Government would shackle the petitioners, Brown and Smith, with the possession of a store full of

merchandise wrongfully seized from Knuckles to convict them, but deny them the same possessory interest required under Rule 41 (e), to have the same evidence suppressed.

II

Although the Sixth Circuit acknowledged the error of the District Court in allowing into evidence the confession of one defendant, it found the error to be harmless, relying on *Burton v. United States*, 391 U.S. 123. The confessions were, of course, made after the alleged conspiracy had been frustrated.

In *Fishwick v. United States*, 329 U.S. 215, 217, this Court ruled that a confession or admission by one co-conspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise. It is rather a frustration of it.

In *Harrington v. California*, 395 U.S. 250, the rule was stated to be that although the use of confessions by co-defendants who did not testify amounted to a denial of the petitioner's constitutional right of confrontation, the evidence supplied through such confessions was merely cumulative, and the other evidence against the petitioners was so overwhelming the court could conclude beyond a reasonable doubt that the denial of the petitioner's constitutional rights constituted harmless error.

A similar rule was enunciated in *Chapman v. California*, 386 U.S. 987.

If these rules have been properly applied to the instant case, then in the future where two co-conspiring defendants are caught in a truck loaded with allegedly stolen merchandise, it will be harmless error to admit into

evidence their confession incriminating one another although it is a plain violation of their right of confrontation as announced in *Bruton*.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be reversed and the case remanded with directions to send it back to the district court for a hearing on the question of petitioner's standing to suppress the evidence seized in Knuckles Store, and for a new trial free of the errors committed.

Respectfully submitted,

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August 28, 1972.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6193

**JOSEPH EVERETT BROWN and THOMAS DEAN SMITH,
PETITIONERS**

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT**

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (App. 243-246) is reported at 452 F. 2d 868.

JURISDICTION

The judgment of the court of appeals (App. 247) was entered on December 20, 1971. Pursuant to an order extending the time to file a petition for a writ of certiorari, the petition was filed on February 17, 1972. Certiorari was granted on June 26, 1972

(App. 249). 408 U.S. 922. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether defendants charged with transportation of stolen merchandise and conspiracy have standing to challenge the lawfulness of the seizure of the stolen merchandise from the custody and premises of a co-conspirator to whom they had delivered the goods.

2. Whether the court of appeals properly held that, in view of the other independent evidence establishing petitioners' guilt, the erroneous admission at trial of testimony concerning declarations by each petitioner in part implicating the other petitioner, in violation of *Bruton v. United States*, 391 U.S. 123, was harmless beyond a reasonable doubt.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Kentucky, peti-

tioners were convicted of having conspired to steal, transport in interstate commerce, and conceal merchandise worth more than \$5,000, knowing the merchandise was stolen, and of having committed the substantive offense of transporting the merchandise from Ohio to Kentucky with knowledge that it was stolen, in violation of 18 U.S.C. 371 and 2314 respectively. Each was sentenced to concurrent prison terms of five years. The court of appeals affirmed (App. 243-246).¹

1. The indictment alleged that beginning on or about June 12, 1970, and continuing until about August 28, 1970, petitioners had conspired to steal merchandise in Cincinnati, Ohio, and transport it for delivery to co-defendant Knuckles in Manchester, Kentucky (App. 8-10). Petitioners were arrested in the course of stealing merchandise in Cincinnati on August 28 (App. 50, 119-120). Prior to trial, petitioners and co-defendant Knuckles moved to suppress other stolen merchandise which had been seized during a search of Knuckles' General Dollar Store in Manchester, Kentucky, on August 29, 1970 (App. 23, 49, 60, 85). At the hearings on the motion (App. 11-117), the merchandise was identified as belonging to the Central Jobbing Company of Cincinnati, Ohio; it had been delivered to Knuckles by petitioners on prior occasions (App. 50). The seizure was made in the course of a search of the store, conducted pur-

¹ A third defendant, Clinton Knuckles, was joined in the conspiracy count and was named alone in a separate count charging receiving and concealing stolen merchandise, in violation of 18 U.S.C. 2315. The charges against him were severed for separate trial (App. 243).

suant to a warrant (App. 12-16). Knuckles was on the premises at the time but petitioners, who were in custody in Ohio, were not (App. 39, 112-113). At the hearing, it was conceded by the government that the search warrant was invalid (App. 109); it had been signed in blank by the issuing Manchester City Police Judge, who failed to observe whether or not "there was anybody's name on that affidavit" and did not administer an oath to the affiant (App. 12-16).*

The district judge raised the standing issue himself (App. 34). There was never any question about Knuckles' standing since it was his store that was searched and he was present at the time. Petitioners argued that under the Fourth Amendment and under Rule 41(e), Fed. R. Crim. P., "any defendant against whom this evidence is to be used as prosecuting evidence has the standing to move to suppress," and "if one who has a standing to make the motion, makes the motion and it is successful in the courts, then any defendant against whom this testimony is to be used has * * * standing * * *" (App. 34, 35). For this proposition they cited *McDonald v. United States*, 335 U.S. 451 (App. 34, 35, 109-111). They alleged no proprietary interest in the premises searched or

* The local judge testified at the hearing that he was called at home on Saturday, August 29, and told that a search warrant was needed. The call came, he testified, "as I was preparing to take my wife to the hospital. She was very seriously ill with asthma * * *" (App. 12). He was taken to meet with the County Attorney, and because "I was in a rush to get my wife to the hospital" he signed the warrant in blank (App. 18).

the goods seized.* Nor were they present at the store when the search took place (App. 39, 112-113). Counsel for petitioners argued in the alternative, however, that, under *Jones v. United States*, 362 U.S. 257, and *Simmons v. United States*, 390 U.S. 377, petitioners automatically had standing to challenge the seizure, since "possession" was an element of the offenses with which they were charged; they therefore "don't have to have possession at the time the unconstitutional search takes place" (App. 112), he urged.

The motion to suppress was granted as to Knuckles only (App. 116). In denying petitioners' motion for lack of standing, the district judge asked counsel rhetorically (App. 113):

Well, what right of yours has been violated? You don't claim the property. You don't claim * * * the store. What right of these people has been violated? They were up in Cincinnati.

Evidence about the stolen merchandise seized from Knuckles' store was admitted at the trial; its retail value was shown to be in excess of \$100,000.00 (App. 173). At no time had it been sold by its owner, the Central Jobbing Company, to Knuckles or to anyone else (App. 208-218).

* At the trial it was brought out that on the evening of their arrest, August 28, prior to the search and seizure, both petitioners had given statements to the authorities indicating that they had sold the previously stolen merchandise to Knuckles for various amounts of cash (App. 131-135, 146-147).

2. Other evidence at the trial showed that, at the times in question, petitioners were employed by Central Jobbing Company ("Central"), a wholesaler of household goods and clothing which sold primarily to its own retail outlets in Ohio, Kentucky, and Virginia (Tr. 25-28).⁴ Central's warehouse in Cincinnati was managed by petitioner Brown, who was entrusted with the keys to the building (Tr. 27-28); petitioner Smith was a truck driver for the company (Tr. 28). During 1968 and 1969, Central had experienced losses attributed to pilferage amounting to approximately \$60,000 each year (Tr. 43). On August 18, 1970, William West, a buyer and supervisor for Central, found a slip of paper that he had seen drop from petitioner Brown's pocket. On the slip, in Brown's handwriting, was a list of warehouse merchandise, together with a price next to each item well below wholesale cost (App. 164-165). The total inventory listed and priced by Brown amounted to \$2,200.00. West estimated that the lowest total wholesale price for these items would have been about \$6,400.00, and that the total fair market price was about \$10,000.00 (App. 164-169).

The Hamilton County police were promptly notified and set up a surveillance of the warehouse. Shortly after 4:00 p.m. on August 28, 1970, petitioners were observed wheeling carts containing boxes of merchandise from the warehouse to a U-Haul van; one of the officers took twenty photographs of petitioners

⁴ "Tr." refers to the transcript of trial proceedings.

loading the merchandise onto the truck. It took about one hour to fill the van; petitioners then locked the warehouse, and drove off in the van. They had not gone far before they were stopped by the county police. Petitioners were placed under arrest, advised of their constitutional rights, and taken, with the loaded van, to police headquarters (App. 119-121, 152, 155-160).

The owner of a Humble service station in Cincinnati identified rental invoices showing that Brown had on two prior occasions (June 12 and 30, 1970) rented a U-Haul truck from him; the mileage on each truck when Brown returned it approximated the distance of a round trip from Cincinnati to Manchester, Kentucky (Tr. 145-149). Five witnesses from Manchester testified that, sometime in June 1970, they had seen petitioners late at night unloading boxes from a U-Haul truck and carrying them into Knuckles' store (Tr. 190-193, 209-214, 222-224, 233-236, 247-250).

3. Following their arrest, both petitioners, after being advised of their constitutional rights, made separate statements to Detective Hulgin of the Hamilton County Sheriff's Office.⁵ At trial, these statements were introduced through the detective's testimony (App. 118-156).

a. No objection was made to that part of Hulgin's testimony dealing with the admissions by each peti-

⁵ Petitioner Smith also made a statement to F.B.I. agent Whitley following his arrest on federal charges on September 1, 1970.

tioner which contained no inculpatory reference to the other. This included, for example, the following statements to the detective by petitioner Smith (App. 128-129, 134-135):

Q. 41. And what did he say with regard to his participation or no participation on any occasion before between the 12th day of June, 1970, and the 28th day of * * * August, 1970, from Central Jobbers there in Cincinnati?

A. In relation to that period of time, he stated that on several occasions he has removed some property from this warehouse. He did only specify one particular date, that would have been the 29th of June.

Q. 42. 29th of June. And what sort of vehicle did he say that was used on this prior occasion or the several prior occasions?

A. A U-Haul van truck.

Q. 43. And did he say where he got the U-Haul van truck or who got it?

A. He stated that the U-Haul van truck on most occasions was not rented by himself, but he did know where it came from.

Q. 44. Where did he say the goods were taken from on these prior occasions?

* * * * *

A. The goods were taken from the warehouse of Central Jobbing Company.

Q. 45. And did he say or state where the goods were taken, if anywhere?

A. To a destination.

Q. 46. Where was that?

A. He stated they were taken to Manchester, Kentucky, to Knuckles Discount Store.

Q. 47. And did he state what times during the day that he removed these goods from the warehouse on these previous occasions?

A. He stated it was usually after the warehouse closed, between 4:00 p.m. and 6:00 p.m., in that area.

* * * * *

Q. 66. Now, did you during this interview ask him how much money was received from the selling of this merchandise to the Knuckles Store?

* * * * *

A. He said of that money on one occasion he received \$600.00 and on the other occasion he received \$800.00.*

Similarly, Hulin testified without objection to the following inculpatory admissions by petitioner Brown (App. 146-147):

A. * * * I asked him if he has ever been involved in removing any other property from the Central Jobbing Warehouse on any other occasion other than that particular day. His reply was that yes, he had been involved in the past. I asked him if he could specify any particular dates when this may have occurred or any one he may have been in the company with at this time. He indicated to me that you should know. That's approximately his words, "You should know all about it by now." I asked him again if he would care to specify more particularly.

* F.B.I. agent Whitley testified that, after being advised of his rights, Smith admitted to him his involvement in the theft, transportation, and sale of the merchandise (App. 220-221).

He stated, "Yes." He said he didn't recall the exact dates, but that * * * at least two other occasions he did remove truck loads of merchandise from the warehouse. I asked him where he had taken this merchandise to. He stated he had taken it to Knuckles Discount Store in Manchester, Kentucky.

Q. 142. Did the defendant, Joseph Everette Brown, tell—did he indicate to you how these goods were taken to Manchester when he was participating?

A. Yes. He stated that they had been removed in U-Haul trucks.

Q. 144. And where did he take these goods on these occasions? Did he say that?

A. Yes. He stated the goods were transported to Knuckles Discount Store in Manchester, Kentucky.

Q. 145. Did he relate to you as to how much he had received for these goods which he had taken on these two occasions?

A. No, sir, he did not specify particular amounts of money other than the fact that he did receive money.

b. Objections were interposed, however, under *Bruton v. United States*, 391 U.S. 123, to those portions of testimony by Hulgín and by F.B.I. agent Whitley that referred to statements of one petitioner, made out of the presence of the other, which implicated the other in the crimes charged. The trial

judge overruled the objections' (App. 124-126, 129-130, 134-135, 137, 138, 220-222), and this testimony which consisted mainly of statements by Smith implicating Brown, was admitted into evidence.* The

* The decision of the trial judge was based on his reading of the Sixth Circuit's decision in *Campbell v. United States*, 415 F. 2d 856, as holding that *Bruton* did not apply in conspiracy cases (App. 124). A motion by the defense for a severance of the conspiracy count was denied as untimely (App. 125-127).

* Agent Whitley testified that after he had advised Smith of his constitutional rights (App. 220-221):

Mr. Smith stated that prior to his employment at River-ville, Ohio, he had been employed as a warehouseman at Central Jobbing Company in Cincinnati. He stated during June 1970, another individual, who was also employed at Central Jobbing Company, one Joe Brown, had approached him and asked him to help steal merchandise from Central Jobbing Company and help him transport this merchandise to Manchester, Kentucky. He advised me that during June of 1970, he and Joe Brown made two trips to Manchester, Kentucky, with merchandise consisting of household goods and clothing which they had stolen from Central Jobbing Company. He recalled that to the best of his knowledge that these dates were June 5th and 29th, 1970. He said that he and Mr. Brown had received approximately one-half the value of the stolen merchandise from the owners of the * * * Knuckles Discount Store in Manchester, Kentucky, and that the owners of the Discount Store knew that the merchandise was stolen. Mr. Smith stated further that he had received approximately \$2,500.00 as his share of the money which they had received from the stolen merchandise.

Detective Hulgín related essentially the same information (App. 129, 134-136, 142-143), adding that Smith had also stated that the list, which was found by West at the warehouse, had been prepared and shown to him by Brown, and that the total price of \$2,200.00 shown on the list was the amount of

jury was repeatedly admonished by the court that such cross-inculpatory statements were only relevant to the conspiracy count (count 1) and were not to be considered in connection with the substantive count (count 2) against the non-declarant defendant (App. 134-135, 137-139, 141-142, 147, 220, 228).

4. The jury found petitioners guilty on both counts, and their convictions were affirmed by the court of appeals (App. 243-246).

On the question of petitioners' standing to move to suppress the evidence seized in Knuckles' store, the court below ruled that the district court had properly denied the suppression motion as to petitioners, because they could claim no possessory or proprietary interest in the goods seized or the premises searched; nor could they, under *Alderman v. United States*, 394 U.S. 165, assert the Fourth Amendment rights of Knuckles (App. 245).

The court also held that the district court had violated *Bruton* in admitting those portions of each petitioner's confession which contained inculpatory references to the other.* It held, however, that the

money that petitioners were to receive for that particular shipment to Knuckles (App. 139-142).

Hulgin further testified that he was told by petitioner Brown that on the two previous occasions when he delivered stolen goods to Knuckles he had been accompanied by Smith (App. 146).

*The court concluded that the trial judge misinterpreted its decision in *Campbell v. United States*, 415 F. 2d 356 (C.A. 6), holding "that admission of statements which fall within the co-conspirator exception to the hearsay rule does not deny

error was harmless beyond a reasonable doubt in view of the other independent evidence which overwhelmingly established proof of guilt (App. 246).

SUMMARY OF ARGUMENT

I

Petitioners, although not present at the time of a police search of someone else's store, assert that they should be accorded standing to object to that search because of an alleged possessory interest in the stolen merchandise that was seized. The courts below properly found that petitioners had no Fourth Amendment interest in either the premises searched or the property seized and therefore could not invoke the exclusionary rule.

A. As the Fourth Amendment decisions of this Court have consistently emphasized, the constitutional protection against unreasonable searches and seizures is intended to safeguard rights which are by nature personal, not vicarious or derivative. Consequently, for a defendant to establish that he has standing to move to suppress evidence, he must demonstrate that he was himself a victim of a search or seizure, that is, one against whom the search was directed, as distinguished from one who claims preju-

the Sixth Amendment right of confrontation and cross-examination" (App. 246). Since petitioners' statements had been made while they were in custody, and were not in furtherance of the conspiracy, those portions with respect to which a *Bruton* objection had been interposed were, the court held, erroneously admitted into evidence (*ibid.*).

dice as a consequence of a search and seizure directed at someone else.

In the present case, the search was unquestionably "directed" only at co-conspirator Knuckles. Petitioners' argument to the contrary attempts to invoke principles of partnership and agency to establish some constructive interest of their own in the stolen merchandise seized from Knuckles' store. But such civil law concepts of property and partnership are not controlling for Fourth Amendment purposes. Moreover, the facts of this case do not support petitioners' "partnership" theory. The conspiracy count in the indictment, on which it is based, alleges that the so-called "partnership in crime," as petitioners have characterized it (Pet. Br. 10), had continued only "to and including the 28th day of August, 1970" (App. 8, 9), the day of petitioners' arrest in Ohio. The search and seizure took place the next day, after the scheme had been terminated by discovery and arrest. Furthermore, as each petitioner had confessed the night before the search, they had "sold" the previously stolen goods to Knuckles and had been paid in cash at the time of delivery two months prior to the seizure. It is thus apparent that the "partnership" argument advanced by petitioners as a basis for conferring standing has no foundation either in law or in fact.

But even if, under some legal fiction, petitioners could be deemed somehow to have had constructive possession of the stolen merchandise at the time that it was seized, their position on the standing question

would not be materially improved. Mere "possession" of property known to be *stolen* does not by itself give rise to a reasonable expectation of privacy sufficient to support a challenge to its seizure. It can reasonably be expected that efforts will be made by the authorities to apprehend the stolen goods from a wrongful possessor and return them to their rightful owner. So long as this is accomplished by a search and seizure that does not otherwise invade some legitimate constitutionally protected interest of the thief—such as his own person or property, or premises in which he has a sufficient Fourth Amendment interest—the values protected by the Fourth Amendment are not served by allowing him to invoke the exclusionary rule based solely on a claim of constructive "possession" of the property seized.

B. Petitioners also claim that, irrespective of the absence of any interference with their personal rights, they are automatically entitled to standing to challenge the search and seizure under *Jones v. United States*, 362 U.S. 257. Even assuming, however, that the substantive count of the indictment here—alleging that petitioners "did transport * * * [in interstate commerce] * * * stolen goods, wares and merchandise * * *" (App. 10)—charges a "possessory" offense within the meaning of *Jones*, the automatic-standing rule announced in that case cannot be extended to the situation presented here.

What primarily concerned the Court in *Jones* was that a defendant charged with the crime of unlawful possession of narcotics would, because he possessed

the narcotics "at the time of the search" (362 U.S. at 263), be confronted with "a special problem" (362 U.S. at 261), since to vindicate his Fourth Amendment rights on a motion to suppress he might have to admit his guilt of the offense charged. That "dilemma" has, however, essentially been eliminated by this Court's subsequent decision in *Simmons v. United States*, 390 U.S. 377, precluding the prosecution from using against a defendant as part of its case in chief the testimony he earlier gave on his suppression motion to establish his standing.

In light of *Simmons*, there is no reason to give petitioners the benefit of the *Jones* automatic-standing rule. Here, unlike *Jones*, the element of unlawful "possession" involved in the substantive offense relates to a time *prior to*, not contemporaneous with, the challenged search and seizure. Thus, even assuming, as did the Court in *Jones* (362 U.S. at 263), that petitioners had failed to "acknowledge interest" in the stolen goods for standing purposes, the government would here not "have the advantage of contradictory positions as a basis for conviction." There is simply no contradiction in obtaining the use of evidence on the ground that petitioners did not have a sufficient possessory interest at the time of the seizure, and thereafter asserting as part of the case in chief that petitioners were in possession of the seized property at some earlier time.

Moreover, even assuming "contemporaneous possession," as petitioners assert, this is not a case where, in the absence of an application of the *Jones*

automatic-standing rule, the government would be able to benefit from "contradictory assertions of power" (362 at 264). The "possession" in this case relates solely to *stolen* merchandise, in which petitioners have no legitimate Fourth Amendment interest. It is, therefore, not necessary for the government to refute such "possession" on the motion to suppress. It can, perfectly consistent with its position at trial, acknowledge petitioners' "possession" of the stolen property at the time that it was seized, but insist that petitioners demonstrate an invasion of some legitimate expectation of privacy on their part to establish standing to challenge that seizure. In this case petitioners have failed to establish that any legitimate expectation of privacy was violated.

II

Petitioners also seek to have their convictions overturned on the ground that certain statements made by each of them following arrest, which also implicated the other, were improperly admitted into evidence in violation of *Bruton v. United States*, 391 U.S. 123. The challenged statements were, however, merely cumulative of the other evidence properly before the jury—including petitioners' own confessions—which independently established "the classical open-and-shut case" against petitioners. Accordingly, the court below correctly concluded that the error of the district court in admitting the *Bruton* statements was in this instance harmless beyond a reasonable doubt.

ARGUMENT

I. PETITIONERS LACKED STANDING TO CHALLENGE THE SEIZURE OF THE STOLEN MERCHANDISE

A. Petitioners' Fourth Amendment Rights Were Not Implicated in the Search and Seizure They Sought to Challenge

1. Standing to raise Fourth Amendment claims is closely intertwined with the purposes and protections of the Fourth Amendment itself.¹⁰ The Fourth Amendment establishes personal rights. It provides that the people shall be secure "in *their* persons, houses, papers, and effects, against unreasonable searches and seizures * * *" (emphasis added). As stated in *Katz v. United States*, 389 U.S. 347, 353, "the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures * * *." "[W]herever an individual * * *

¹⁰ This case presents in a slightly different context some of the Fourth Amendment issues that the Court declined to decide last Term in *Combs v. United States*, 408 U.S. 224, involving the standing of a defendant charged with a possessory offense to challenge a search for and seizure of stolen property located on the premises of a third party. *Combs* was remanded to the district court for further proceedings, since the standing issue had not been argued in the district court and it was apparently unclear from the record whether the court of appeals had considered the applicability of *Jones v. United States*, 362 U.S. 257, when the question was first raised on appeal. In our Memorandum responding to the certiorari petition in this case, we urged that action on the petition be deferred until *Combs* was decided. On the same date that the decision in *Combs* was announced, the Court granted certiorari in this case (App. 249).

[has] a reasonable 'expectation of privacy', * * * he is entitled to be free from unreasonable governmental intrusion." *Terry v. Ohio*, 392 U.S. 1, 9. Thus, this Court has held that an individual may be aggrieved by a search even though he is not present when it occurs if he has a sufficient interest in the premises where the search takes place to justify a "reasonable expectation of freedom from governmental intrusion." *Mancusi v. DeForte*, 392 U.S. 364, 368.

Because Fourth Amendment rights are personal, and cannot be vicarious or derivative, the inquiry for determining whether a person has standing under the Fourth Amendment to suppress evidence has consistently focused on whether the movant is a "victim" of the search. See *Alderman v. United States*, 394 U.S. 165, 173. As the Court has explained in *Jones v. United States*, *supra*, 362 U.S. at 261, in construing the language of Rule 41(e) of the Federal Rules of Criminal Procedure, which enforces the exclusionary rule formulated under the Fourth Amendment, "to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else."

In the present case, the search was unquestionably "directed" only at Knuckles, not at petitioners. It took place in his store; petitioners have never asserted any ownership or other personal interest in

those premises. Only Knuckles was present at the time of the search and seizure; petitioners were by then already in custody in another state. And the property seized admittedly belonged to the Central Jobbing Company. In this context, petitioners can point to no aspect of the search and seizure that impinged upon *their* personal "expectation of privacy" under the Fourth Amendment.

2. In their brief, petitioners attempt to invoke principles of partnership and agency to establish some "interest in and to the partnership property which was unlawfully found and seized in Knuckles Store in Manchester, Kentucky" (Pet. Br. 11). There is no foundation either in law or in fact for resting standing on such a theory.¹¹

This Court has made some references to "partnership" concepts in describing the relationship among co-conspirators. See, e.g., *Fiswick v. United States*, 329 U.S. 211, 216; *Pinkerton v. United States*, 328 U.S. 640, 644; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150; *United States v. Kissel*, 218 U.S.

¹¹ This argument was not made in the courts below or in the petition for a writ of certiorari; it is therefore not properly before the Court. See *Lawn v. United States*, 355 U.S. 339, 362, n. 16. In fact, petitioners had conceded in the district court that "they had no possession" at the time of the search and seizure, but they contended that that was irrelevant (App. 112). See pp. 4-5, *supra*. Their primary contention was that if one defendant had standing to have evidence suppressed, each co-defendant automatically has standing to have the evidence suppressed as to himself as well: "His presence or absence, or his ownership or possession, or his lack of ownership or possession, would have nothing to do with it" (App. 111).

601, 608. But the illustrative use of such analogies does not provide a basis for invoking "the law pertaining to partnership property" (Pet. Br. 11) to sustain a claim of constructive possession for Fourth Amendment purposes. First, civil law concepts of property rights are not controlling for Fourth Amendment purposes. See, e.g., *Katz v. United States*, *supra*, 389 U.S. at 352, 353; *Mancusi v. DeForte*, *supra*, 392 U.S. at 367-368. Second, even under traditional partnership law, "[i]t is a well-grounded principle that no partnership can exist for the accomplishment of an illegal purpose." Rowley, *Partnership: The Substantive Law* (2d ed. 1960) §31.3, p. 601; and see Uniform Partnership Act, Sec. 31(3). Thus, the stolen merchandise involved here is no more "partnership property," in the sense urged by petitioners, than it is the personal property of any member of the conspiracy. See *United States v. Sacco*, 436 F.2d 780, 784 (C.A. 2), certiorari denied, 404 U.S. 834.¹²

Moreover, the facts of this case do not support petitioners' "partnership" theory. Contrary to their apparent argument, petitioners were not charged with possession of the stolen property at the time of the search and seizure, constructively attributed to them because it was seized from their "partner." On the

¹² Even Knuckles, who was accorded standing to contest the search and seizure, was in no position to assert a proprietary interest in the goods seized; his claim of invasion of privacy rested instead on the unlawful intrusion on his premises, without his consent, and at a time when he was legitimately present (App. 34). See *Jones v. United States*, *supra*, 362 U.S. at 267.

contrary, the indictment alleged that both the conspiracy to steal and transport the property and the actual interstate transportation of it had continued only "to and including the 28th day of August, 1970" (App. 8, 9), the day of petitioners' arrest in Ohio. The search and seizure took place the next day, after the scheme had been terminated by discovery and arrest. The introduction of evidence about the discovery of stolen merchandise merely corroborated petitioners' confessions about their *prior* thefts and deliveries and the other independent evidence of those pre-seizure offenses. Nor is there any basis for asserting a lingering "partnership" interest in either the general store or the stolen merchandise Knuckles kept there. As each petitioner had confessed the night before the search, they had "sold" the previously stolen goods to Knuckles and had been paid in cash upon delivery two months prior to the seizure.¹²

3. The Court has already categorically rejected petitioners' closely related and more familiar argument (see n.11, *supra*) that if one defendant has standing, any co-defendant against whom the evidence is sought to be used can also have it suppressed. In disposing of this claim in *Wong Sun v. United*

¹² As Judge Friendly observed in *United States v. Bozza*, 365 F. 2d 206, 223 (C.A. 2), the values sought to be protected by the Fourth Amendment are not served "by holding that a thief who has left evidence of his crime on the premises of a confederate is subrogated to the latter's right to complain of a search and seizure * * *."

States, 371 U.S. 471, 492, where the Court held that the suppression of heroin as to one co-conspirator did "not compel a like result with respect to Wong Sun," it was explained: "[t]he seizure of this heroin invaded no right of privacy of person or premises which would entitle Wong Sun to object to its use at his trial."⁴⁴ And this point was recently underscored in *Alderman v. United States*, 394 U.S. 165, where the Court, after reviewing its earlier decisions discussing the essential purposes underlying both the Fourth Amendment and the exclusionary rule formulated thereunder, held that defendants in the position of the present petitioners have no standing to challenge the use of evidence that may have been unlawfully seized from someone else. As there stated (394 U.S. at 171-172, 174; emphasis added):

In *Mapp* [v. *Ohio*, 367 U.S. 643] and *Weeks* [v. *United States*, 232 U.S. 383], the defendant against whom the evidence was held to be inadmissible was the victim of the search. However, in the cases before us each petitioner demands retrial if any of the evidence used to convict him was the product of unauthorized surveillance, regardless of whose Fourth Amendment rights the surveillance violated. At the very least, it is urged that if evidence is inadmissible against one defendant or conspirator, because tainted by electronic surveillance illegal

⁴⁴ The Court explicitly distinguished *Jones*, *supra*, because in *Jones* the "person challenging the seizure of the evidence was lawfully on the premises at the time of the search." 371 U.S. at 492, n. 18.

as to him, it is also inadmissible against his co-defendant or coconspirator.

This expansive reading of the Fourth Amendment and of the exclusionary rule fashioned to enforce it is admittedly inconsistent with prior cases, and we reject it. The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were *violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence.* Coconspirators and codefendants have been accorded no special standing.

* * * * *

We adhere to these cases and to the general rule that Fourth Amendment rights are personal rights which, like some constitutional rights, may not be vicariously asserted. * * *

4. Even if, contrary to our argument, this Court accepts petitioners' "partnership theory" as a basis for recognizing that they had some "possessory" interest in the seized property, we submit that they still should not be accorded standing to invoke the exclusionary rule. It is our position that, consistent with the essential purpose of the Fourth Amendment to protect *personal* rights (*supra*, pp. 18-19), unless a defendant can point to an invasion by a search

¹⁶ The Court also noted in *Alderman* (394 U.S. at 173, n. 7) that *McDonald v. United States*, *supra*, on which petitioners placed partial reliance in the district court (see p. 4, *supra*), "is not authority to the contrary." See, also *United States v. Wells*, 437 F. 2d 1144, 1146 (C.A. 6); *United States v. Lopez*, 420 F. 2d 813, 816 (C.A. 2).

and seizure of some other constitutionally protected interest that is legitimately his own, mere "possession" of property known to be stolen does not alone give rise to a reasonable expectation of privacy sufficient to support a challenge to its seizure. Where persons claim constructive possession of *stolen* property, they cannot be said to have "a reasonable expectation of freedom from governmental intrusion" (*Mancusi v. DeForte*, *supra*, 392 U.S. at 368) with respect to that property, so as to make them "victims" of a search and seizure for "standing" purposes, when such property is seized from remote premises with respect to which they otherwise have no interest or legitimate expectation of privacy.¹⁰ That, of course, is the situation here.¹¹

¹⁰ The "reasonableness" of such an invasion of privacy would, of course, be a matter for determination once "standing" has been established; it would not bear on the threshold question of standing to move to suppress.

We note that this Court has indicated that, under the Fourth Amendment's flexible standard of reasonableness (see *Camara v. Municipal Court*, 387 U.S. 523, 534-539), searches for and seizures of stolen goods, where the government is entitled to recover the property, may require less justification than where personal effects are seized from their rightful owner. See *Davis v. United States*, 328 U.S. 582, 590-591; *Boyd v. United States*, 116 U.S. 616, 623-624.

¹¹ There may be some question whether one who claims that he innocently possessed the stolen property, not knowing it to be stolen, can be deemed to be a "victim" of a search and seizure for standing purposes. Since it is still stolen property, he plainly is in no better position to assert an actual possessory interest therein under the Fourth Amendment as his personal "effects." But perhaps it could be argued that, because he had no reason to know that the property was stolen, he should be

Our position on this point has substantial historical and constitutional support. Prior to this Court's formulation of the exclusionary rule under the Fourth Amendment,²⁸ the typical means of asserting a claim of invasion of privacy due to an interference with property rights by law enforcement officers was by way of a common law action of trespass or conversion for damages, or by replevin for return of the property. See, e.g., *Entick v. Carrington*, 19 Howell St. Tr. 1029 (trespass action); *Banks v. Farwell*, 21 Pick. 156 (Mass.) (same); *Oviatt v. Pond*, 29 Conn. 479 (conversion action).²⁹ But recovery in such suits was premised on a showing by the plaintiff that he was, at the time of the wrongful intrusion, not only in possession of the property seized or injured, but also that he had some colorable claim of right to it. "No court ever has allowed an admitted, or even a clearly proved, thief without a claim of right to recover * * *." Prosser, *Torts* (4th ed. 1971) 94; and see *id.* at 78, n. 62.

deemed to have had a legitimate expectation of privacy for standing purposes.

The question is not presented in this case since it was clearly established at the suppression hearing that these petitioners knew that the merchandise they transported to Knuckles store had been stolen from the Central Jobbing Company (App. 50).

²⁸ See, e.g., *Boyd v. United States*, 116 U.S. 616; *Weeks v. United States*, 232 U.S. 383.

²⁹ At common law, the admissibility of evidence was not affected by the illegality of the means by which it was obtained. See *Adams v. New York*, 192 U.S. 585, 594-595; and see VIII Wigmore, *Evidence* (McNaughton rev. 1961) § 2183.

One in possession of stolen property should, we think, be in no better position under the exclusionary rule to assert a claim of invasion of privacy with respect to the seizure of that property than he is in an action to recover damages grounded on essentially the same claim. Cf. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388. This Court observed in *Jones*—in treating separately an aspect of the “standing” question not directly involved here (see n. 25, *infra*)—that those whose presence on searched premises is “wrongful” cannot invoke the privacy of the premises as a basis for challenging the search thereof (362 U.S. at 267). See also *United States v. Cole*, 416 F.2d 827 (C.A. 6), certiorari denied, 397 U.S. 1027 (trespasser has no standing). Similarly, those whose possession of personal property is “wrongful”, because the merchandise is known to be stolen, should not be permitted to claim a legitimate Fourth Amendment interest in that property when it is seized. They can reasonably anticipate that efforts will be made by the authorities to apprehend the goods to return them to the rightful owners; thus, their “possession” does not alone warrant “a reasonable expectation of freedom from governmental intrusion” (*Mancusi v. DeForte*, *supra*, 392 U.S. at 368). The mere fact of prior or constructively contemporaneous possession, if “wrongful,” deserves no greater protection under the Fourth Amendment than is accorded to mere “presence” alone, when it is “wrongful.” Plainly a trespasser who has hidden stolen goods on a stranger’s

premises, should not, simply by virtue of his claimed interest in the hidden property, be allowed to stand in the same shoes as one "legitimately on premises where a search occurs" (*Jones, supra*, 362 U.S. at 267) for purposes of challenging the search and seizure.

This, of course, is not to say that whenever stolen property is seized, the possessor thereof has no standing to complain. If the seizure takes place in his home or office, for example, or on the premises of another when he is rightfully present, he would have standing to move to suppress. The same would be true if the stolen goods were obtained as a result of an unwarranted search of his person. But the thief who secretes property he has stolen in an open field, or, as here, on someone else's premises in which he has no Fourth Amendment interest, suffers no infringement of any legitimate expectation of privacy at the time that the property is seized, and "[n]o valuable social purpose could conceivably be served by extending [to him] the protection of the Fourth Amendment * * *." *Palmer v. State of Maryland*, 286 A. 2d 572 (Md. Ct. of Spec. App.). See also *United States v. Sacco*, 436 F.2d 780 (C.A. 2), certiorari denied, 404 U.S. 834.²⁰

²⁰ *United States v. Jeffers*, 342 U.S. 48, does not point in the opposite direction. That case involved the seizure of heroin from the hotel room of the defendant's aunts. Standing was recognized because the defendant had permission to use the room at will and thus had a lawful interest in the premises. See *Mancusi v. DeForte, supra*, 392 U.S. at 368. While the Court also added that the seized narcotics could be treated as "being [defendant's] property, for purposes of the exclusion

The deterrent impact of the exclusionary rule is not diminished by denying a thief "standing" in such circumstances.²¹ The fact that the thief's earlier possession or constructive possession of the stolen goods is entitled to no independent protection under the Fourth Amendment does not encourage law enforcement officers to be any less circumspect in their respect for legitimate expectations of privacy of the person or premises. And, without some actual invasion of the thief's personal privacy, there is no more reason to accord standing than there is when other evidence is seized from third parties that, under present law, can be introduced against persons whose privacy has not been invaded. See *Alderman v. United States*, *supra*, 394 U.S. at 171-172, 175.²² See also,

ary rule * * * (342 U.S. at 54), that observation does not apply here where stolen property, rather than contraband is involved. See, also, the Court's discussion of standing based on an interest in the premises searched rather than in the property seized, in *Alderman v. United States*, *supra*, 394 U.S. at 177, n. 10.

²¹ See generally Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970); and see *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, *supra*, 403 U.S. at 415-418 (Burger, C. J., dissenting).

²² In *Alderman*, the Court rejected an argument by the defendant that the rules of standing should be liberalized as a means of increasing the deterrent function of the exclusionary rule (see, e.g., *Elkins v. United States*, 364 U.S. 206; *Linkletter v. Walker*, 381 U.S. 618, 636-637). The Court stated (394 U.S. at 174-175) that it was "not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon

Parman v. United States, 399 F.2d 559, 564-565 (C.A.D.C.), certiorari denied, 398 U.S. 858; *Feguer v. United States*, 302 F.2d 214, 248-250 (C.A. 8), certiorari denied, 371 U.S. 872.²² Cf. *Klingler v. United States*, 409 F.2d 299, 304-305 (C.A. 8), certiorari denied, 396 U.S. 859.

For these reasons, the courts below properly refused to recognize that petitioners had a sufficient interest under the Fourth Amendment to challenge the use against them of the stolen merchandise seized at Knuckles' general store.

B. Petitioners Are Not Entitled to Automatic Standing Under *Jones v. United States*, 362 U.S. 257, Simply Because Possession of the Seized Property At An Earlier Time Was an Element of the Offense

Petitioners also appear to make the claim that, irrespective of the absence of any interference with

the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." See, also, *Lego v. Twomey*, 404 U.S. 477, 487-489.

²² These cases rejected the argument that, in order to effectuate the deterrent function of the exclusionary rule, evidence seized by law enforcement authorities from abandoned premises should be suppressed where the officers did not know at the time of their search and seizure that an abandonment had occurred, and the search would have been illegal but for that fact. Since the defendants' privacy had not been invaded, the courts found no occasion to exclude the evidence merely to attempt to deter a repetition of the same type of conduct by the officers. And see *Massachusetts v. Painten*, 389 U.S. 560, 564-565 (White, J., joined by Stewart and Harlan, JJ., dissenting from the dismissal of certiorari as improvidently granted).

their personal rights, they are automatically entitled to standing to challenge the search and seizure under *Jones v. United States*, *supra* (Pet. Br. 12-13). It is argued that because count 2 of the indictment charges that petitioners "did transport * * * [in interstate commerce] * * * stolen goods, wares and merchandise * * *" (App. 10), thereby requiring the government to prove, *inter alia*, "possession" to convict, petitioners fit within the automatic-standing rule created in *Jones*. We believe it is unnecessary for the Court to determine whether the substantive count here—interstate transportation of stolen property—charges a "possessory" offense within the meaning of *Jones*.²⁴ Neither the rationale of that decision

* In *Jones*, the defendant was charged with narcotics offenses (21 U.S.C. (1964 ed.) 174, 26 U.S.C. (1964 ed.) 4704(a)) which, because of statutory presumptions, permitted conviction upon proof of knowing possession alone. The Third Circuit initially read the decision as permitting an application of the automatic-standing rule only where "possession" is alone sufficient to convict. See *United States v. Konigsberg*, 386 F. 2d 844, 847 (C.A. 3), certiorari denied, 379 U.S. 933.

The First and Tenth Circuits, however, disagreed, and held the rule to be applicable even when "possession" is but one element of the offense charged. See *Niro v. United States*, 388 F. 2d 535, 537 (C.A. 1); *Simpson v. United States*, 346 F. 2d 291, 295 (C.A. 10). This conflict was for most courts of appeals deemed settled by the dicta of this Court in *Simmons v. United States*, *supra*, 390 U.S. at 390, summarizing *Jones* as indicating "that * * * when * * * possession of the seized evidence is itself an essential element of the offense * * * charged, the Government is precluded from denying that the defendant has the requisite possessory interest to challenge the admission of the evidence" (emphasis supplied).

Since *Simmons*, the *Konigsberg* interpretation of the *Jones* decision has in effect been abandoned in favor of the position

insofar as it concerns possession as a basis for standing, nor the fundamental purpose of the Fourth Amendment as a protection of individual privacy, supports an application of the *Jones* automatic-standing rule in the circumstances of this case.

1. The Court's focus in *Jones* on the "possessory" nature of the offense charged as a basis for determining "standing" to challenge a search and seizure rests on two policies that in the present context bear only remotely on the "privacy" considerations normally associated with the Fourth Amendment.²⁵

On the one hand, the automatic-standing rule was

taken in *Niro* and *Simpson*, not only in the Third Circuit (*United States v. West*, 453 F. 2d 1351) but in most other courts of appeals that have considered the question. See, e.g., *United States v. Price*, 447 F. 2d 23, 28-29 (C.A. 2); *United States v. Cobb*, 432 F. 2d 716, 719-722 (C.A. 4); *Glisson v. United States*, 406 F. 2d 423, 425-426 (C.A. 5); *Colosimo v. Perini*, 415 F. 2d 804 (C.A. 6); *United States v. Allsenberrie*, 424 F. 2d 1209, 1213-1214 (C.A. 7). See also *Baker v. United States*, 401 F. 2d 958, 982 (C.A. D.C.) (dictum); *Kuhl v. United States*, 370 F. 2d 20, 34-36 (C.A. 9) (*en banc*; opinion of four judges dissenting).

²⁵ *Jones* involved the execution of a search warrant directed to an apartment in which the defendant, who was present during the search, had no interest greater than an invitee or guest. The Court conferred "standing" not only on the basis of the possessory charge in the indictment—which is the aspect of the decision presently under consideration—but also on the ground that "anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him" (362 U.S. at 267). This latter ruling is not involved in the present case (see pp. 4-5, 19-20, *supra*), and we do not question here its essential soundness. See *Manousi v. DeForte*, *supra*.

formulated so that a defendant, who was charged with a crime involving possession and desired to vindicate his Fourth Amendment claim, would not be "forced to allege facts the proof of which would tend, if indeed not be sufficient, to convict him" (362 U.S. at 262). The so-called "dilemma" (*ibid.*) that the Court sought to eliminate by its new rule was described by Mr. Justice Frankfurter in the following terms (*ibid.*):

At the least, such a defendant has been placed in the criminally tendentious position of explaining his possession of the premises. He has been faced, not only with the chance that the allegations made on the motion to suppress may be used against him at the trial, although that they may be by no means an inevitable holding, but also with the encouragement that he perjure himself if he seeks to establish "standing" while maintaining a defense to the charge of possession.

In addition, the Court stated (362 U.S. at 263):
 " * * * we are persuaded by this consideration: to hold to the contrary, that is, to hold that [the defendant's] failure to acknowledge interest in the narcotics or the premises prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction." Expanding on this theme, the Court reasoned (362 U.S. at 263-264):

[The defendant's] conviction flows from his possession of the narcotics at the time of the search. Yet the fruits of that search, upon which the

conviction depends, were admitted into evidence on the ground that [defendant] did not have possession of the narcotics at that time. The prosecution here thus subjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government. The possession on the basis of which [defendant] is to be and was convicted suffices to give him standing under any fair and rational conception of the requirement of Rule 41(e) [Fed.R.Crim.P.]²⁸

2. With regard first to the "dilemma" rationale sustaining the automatic-standing rule of *Jones*, the "special problem" (362 U.S. at 261) then confronting defendants with Fourth Amendment claims that prompted a relaxation of conventional standing requirements for possessory offenses has, we submit, largely been dissipated in view of this Court's later ruling in *Simmons v. United States*, *supra*.

Simmons involved a conviction of two defendants, Simmons and Garrett, for the armed robbery of a federally insured savings and loan association (18

²⁸ We earlier noted that Rule 41(e), Fed.R.Crim.P., is "a statutory direction governing the suppression of evidence acquired in violation of the conditions validating a search" (*Jones v. United States*, *supra*, 362 U.S. at 260). As this Court pointed out in *Alderman v. United States*, *supra*, 394 U.S. at 173, n. 6: "*Jones* thus makes clear that Rule 41 conforms to the general standard and is no broader than the constitutional rule."

U.S.C. 2113). The Court was called upon to decide whether the government had been properly permitted as part of its case in chief to use against Garrett testimony that he had previously given on his unsuccessful motion to suppress evidence on grounds of illegal search and seizure. The evidence seized included several coin cards and money wrappers from the bank that had been robbed; these items were found by federal agents in a suitcase during a search of someone else's house. The Court stated that Garrett had justifiably assumed that he had to meet the standing requirements affirmatively in order to challenge the use of the items against him; to meet this burden Garrett had tried to establish standing by testifying to ownership of the suitcase (390 U.S. at 381, 390).²⁷

²⁷ *Simmons* implicitly raises the question whether *Jones* should properly be understood as extending beyond cases where possession alone is sufficient to convict, as under the narcotics laws. In the present case, possession (at some time, but not necessarily at the time of seizure) of stolen property is, as we have conceded, a necessary factual element of the offense of interstate transportation of stolen property. But bank robbery, the crime involved in *Simmons* ~~and Garrett~~, also requires proof of possession, since the crime consists of forcibly taking "any property or money or any other thing of value" from a bank. 18 U.S.C. 2113(a). Yet in *Simmons* the Court clearly regarded *Jones* as not according Garrett automatic standing to challenge the legality of the seizure of the stolen loot. On the contrary, the basis for the Court's decision was that Garrett had to establish that his personal rights were involved in the search for and seizure of the evidence, and that as a practical matter it was necessary for him to testify to this factual predicate for standing. Compare the cases discussed in n. 24, *supra*.

In that context, the Court held that Garrett's suppression testimony was inadmissible against him at trial (390 U.S. at 394). If the earlier testimony were available to the prosecution for later use, the Court reasoned (390 U.S. at 392-393), this might well deter some defendants "from presenting the testimonial proof of standing necessary to assert a Fourth Amendment claim." And, as recently explained in *McGautha v. California*, 402 U.S. 183, 211-213, wherein the rationale of *Simmons* was re-examined, such a deterrence in this area could thus have the effect of "weakening the efficacy of the exclusionary rule as a sanction for unlawful police behavior." "This," the Court observed (402 U.S. at 211), "was surely an analytically sufficient basis" for the use-restriction rule that emerged in *Simmons*.²²

In light of *Simmons*, defendants wishing to vindicate their Fourth Amendment rights need no longer be concerned about the dilemma which in part underlay the automatic-standing rule of *Jones*. They

²² The Court in *Simmons* also indicated that a use-restriction rule of this sort was necessary to avoid the "intolerable" situation of a defendant being forced to choose between giving up "what he believed * * * to be a valid Fourth Amendment claim, or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination" at trial (390 U.S. at 394). But, in *McGautha* (402 U.S. at 212), the Court stated that the validity of such reasoning, "based on a 'tension' between constitutional rights and the policies behind them * * * must now be regarded as open to question." It did not, however, question the soundness of the result in *Simmons* (402 U.S. at 212).

can now come forward on a motion to suppress and affirmatively demonstrate that the challenged search and seizure implicated their personal, constitutionally protected interests, without fear of jeopardizing their defense at trial on the charge of committing a "possessory" crime. Cf. *United States v. Cobb*, *supra*, 482 F. 2d at 721-722.²⁰

²⁰ It is unclear whether the rule in *Simmons* is limited to the *direct* use at trial of the defendant's earlier testimony, or also bars the introduction of prior contradictory statements for purposes of impeachment only. In *Harris v. New York* 401 U.S. 222, the Court, in a different context, held that the use-restriction rule for in-custody statements under *Miranda v. Arizona*, 384 U.S. 436, did not preclude the prosecution from using such statements to impeach (401 U.S. at 226). *Harris* was concerned with a use-restriction rule grounded on the policy of deterring unlawful police behavior during custodial interrogation; and it was there determined (401 U.S. at 225) that "sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." *Simmons*, on the other hand, established a use-restriction rule, as we have pointed out, grounded on a different consideration, i.e., so that defendants will not "be deterred from presenting the testimonial proof of standing necessary to assert a Fourth Amendment claim" (390 U.S. at 392-393). In this context, it is a difficult question whether such "deterrence" is reduced enough by assuring a defendant that his prior testimony cannot be used against him at trial *directly* to permit its *indirect* use by the government for impeachment purposes. But that question is not presented in this case.

We point out, however, that if the *Harris* holding can appropriately be extended to the use-restriction rule of *Simmons*, such a result would not resurrect for the defendant the type of "dilemma" that concerned the Court in *Jones*. The prospect that earlier testimony on the motion to suppress might be used at trial for impeachment purposes is, we submit, legitimate cause for concern only if the defendant intends to

3. If, then, the automatic-standing concept of *Jones* continues to have vitality, it must be found in the alternative basis advanced, i.e., that "to hold to the contrary, that is, to hold that [the defendant's] failure to acknowledge interest in the [seized property] or the premises prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction" (362 U.S. at 263). This reasoning, however, while perhaps valid in other contexts where the defendant is charged with illegal possession at the time of the search, does not sustain an application of the *Jones* rule in the particular circumstances of this case.

a. Unlike *Jones*, where the only evidence of the defendant's unlawful "possession" was at the time of the seizure of the contraband that he sought to suppress, the petitioners here, as we earlier stated (*supra*, pp. 20-24), were not in possession of the stolen merchandise at the time of its seizure. They had parted with possession when they delivered the goods to

"use perjury by way of a defense" (*Harris v. New York, supra*, 401 U.S. at 226). His "dilemma" thus does not rest on the fact that, if he tells the truth at the suppression hearing, he virtually confesses his guilt of the offense. It is, rather, that if he speaks truthfully on one occasion, he cannot make contradictory statements on the other. But any time a person testifies under oath he is "under an obligation to speak truthfully and accurately" (*Harris v. New York, supra*, 401 U.S. at 225). Accordingly, it would seem particularly inappropriate to relax the requirements for standing to suppress simply to "free [the defendant] from the risk of confrontation with prior inconsistent utterances" (*id.* at 226).

Knuckles, which was between two and three months before the contested seizure occurred. Indeed, the indictment itself charged that petitioners "did transport" the stolen merchandise not later than August 28, the day before the search. Thus, the indictment contemplated proof of "possession" prior to, rather than coincident with, the challenged search and seizure. Where an unlawful search occurs sometime after a defendant has parted with possession of the property seized, at a place in which he has no interest, and at a time when he is not present, the alternative rationale of *Jones* is inapplicable. There is no "contradiction" in government positions to deny that the defendant has a sufficient possessory interest at the time of the search and seizure to challenge them and also to allege at trial that he had possession of the seized property at some earlier time.

We think this is clear from *Jones* itself, where the court explained that in contesting the sufficiency of the defendant's "possession" for standing purposes, the government was in a sense contradicting the indictment, since the defendant's guilt, as charged, "flows from his possession of the narcotics *at the time of the search.*" 362 U.S. at 263; emphasis added.

This reading is also confirmed by the Court's subsequent decision in *Wong Sun v. United States*, *supra*. The Court there held that heroin seized in violation of a defendant's Fourth Amendment rights was not admissible against him. But it also ruled that the heroin was admissible against his co-defendant Wong Sun, who had originally supplied the drugs, even

though proof of that earlier possession was sufficient without more to convict (371 U.S. at 477). Since the heroin had been seized from someone else's premises after Wong Sun had transferred it, there was "no right of privacy * * * or premises which would entitle Wong Sun to object to its use * * *" (371 U.S. at 492). As we observed earlier, the Court explicitly noted that, despite the critical importance of the showing of possession: "This case is not like *Jones v. United States*, 362 U.S. 257, where the person challenging the seizure of evidence was lawfully on the premises at the time of the search." 371 U.S. at 492, n. 18. See, also, *United States v. Wells*, *supra*, 437 F. 2d at 1146; *United States v. Lopez*, *supra*, 420 F. 2d at 313, 316.*

Finally, the decision last Term in *Combs v. United States*, 408 U.S. 224, seems to preclude any justifiable reliance on *Jones* here. In *Combs* the defendant was charged with knowingly receiving, possessing, and concealing stolen property, in violation of 18 U.S.C. 659. The stolen goods were ultimately seized in a shed on the property of the defendant's father (a co-defendant) where they had earlier been stored; the defendant did not live on the property and was not present when the search took place. The issue was whether the defendant had standing to challenge

* But see *United States v. Price*, 447 F. 2d 23 (C.A. 2), where the Second Circuit—in our view erroneously—applied the automatic-standing rule of *Jones* despite the fact that the defendant had relinquished all control over the seized goods before the search and seizure occurred. *Price* was followed in *United States v. Pastore*, 456 F. 2d 99 (C.A. 2).

the lawfulness of the seizure. This Court did not consider the defendant to be automatically entitled to standing under *Jones* merely because he was charged with illegal possession of the stolen property prior to the search; on the contrary, the Court remanded the case to the district court for a determination whether in fact the defendant "had an interest in connection with the searched premises that gave rise to 'a reasonable expectation [on his part] of freedom from governmental intrusion' upon those premises. *Mancusi v. DeForte*, 302 U.S. 364, 368 (1968)." 408 U.S. at 227; footnote omitted. In the present case, the facts have been fully developed, and petitioners neither have, nor claim to have, any cognizable interest in the store where the seizure was made.

b. Moreover, even if, as petitioners urge (Pet. Br. 9-11), this could be considered, under some legal fiction, a case of "contemporaneous possession," the government still would not benefit from what the Court in *Jones* called "contradictory assertions of power" (362 U.S. at 264). The "possession" in this case relates solely to *stolen* merchandise in which, as we have shown, petitioners have no legitimate Fourth Amendment interest. It is, therefore, not necessary for the government to refute such "possession" on the motion to suppress, since it is the lack of a sufficient constitutional interest that is the basis for opposing standing, and the presence or absence of "possession" of stolen property is not germane. There is plainly no inconsistency in the government's asserting before the jury on the issue of guilt that pe-

tioners had possession of the stolen property at the time that it was seized, while requiring petitioners, on a motion to suppress, to establish that some legitimate expectation of privacy on their part, irrespective of such "possession," was invaded by the search and seizure.

In such circumstances, the prosecution does not, as *Jones* suggested (362 U.S. at 263), subject petitioners "to the penalties meted out to one in lawless possession while refusing [them] the remedies designed for one in that situation." The "remedies" under the exclusionary rule depend upon some transgression of the constitutional right to individual privacy. As we have shown, they should not be accorded automatically to one charged with "lawless possession" when the sole basis for his claim of prejudice is the seizure of stolen property in which he has no proprietary interest and with respect to which he can have no reasonable expectation of privacy under the Fourth Amendment. See *Alderman v. United States*, *supra*, 394 U.S. at 179, n. 11.

II. THE IMPROPER ADMISSION UNDER *BRUTON* v. *UNITED STATES*, 391 U.S. 123, OF PETITIONERS' CROSS-INCULPATORY STATEMENTS WAS IN THIS CASE HARMLESS ERROR BEYOND A REASONABLE DOUBT

As set forth in our Statement (*supra*, pp. 7-12), both county detective Hulgín and F.B.I. agent Whitley testified at petitioners' trial concerning statements made to them by each petitioner following his arrest and after being properly advised of his constitutional rights. Much of this testimony was, as we have

already indicated, admitted without objection; however, petitioners did object to the admission of those portions of the recounted statements in which one of them implicated the other, relying on *Bruton v. United States*, 391 U.S. 123. The cross-inculpatory statements were admitted by the district court over petitioners' objection (see pp. 10-12, *supra*).

The court of appeals determined that the admission of the challenged statements violated the principle of *Bruton* and thus was error (App. 246). But "[not] all trial errors which violate the Constitution automatically require reversal." *Chapman v. California*, 386 U.S. 18, 23. This Court has twice declined to overturn convictions where certain evidence was admitted at trial in violation of *Bruton* on the ground that the error, when viewed in light of all the other evidence properly before the jury, was harmless beyond a reasonable doubt. See *Harrington v. California*, 395 U.S. 250; *Schneble v. Florida*, 405 U.S. 427. The court below correctly applied that principle here.

As the Statement clearly shows (*supra*, pp. 6-10) the independent evidence in this case established, to use the words of the court of appeals (App. 245), "the classical open-and-shut case." A slip of paper dropped by petitioner Brown, listing in Brown's handwriting items of merchandise together with suspiciously discounted prices, prompted a police surveillance of Central Jobbing Company's warehouse, where both petitioners were employed and from which substantial amounts of merchandise had been stolen.

Petitioners were observed by the police removing cartons of merchandise from the warehouse after closing hour and loading them onto a U-Haul van truck. (Some twenty photographs taken of petitioners in the process of stealing the merchandise were admitted into evidence at the trial.) Petitioners were arrested as they started to drive away with the stolen merchandise. After being advised of their constitutional rights, both petitioners confessed to having stolen goods from the warehouse previously and to having transported them by truck to Knuckles' store in Manchester, Kentucky (App. 128-129, 146-147). This led the police to Knuckles' store where they discovered merchandise belonging to Central Jobbing Company worth approximately \$100,000. The seizure of this evidence corroborated each petitioner's confession. Five eyewitnesses placed both petitioners at Knuckles' store late one night in June 1970; they were seen unloading from a U-Haul truck some cartons like those stolen from Central Jobbing Company. Other independent evidence showed that petitioner Brown had rented a U-Haul truck twice in June 1970, and on both occasions the truck, when returned, showed approximately the mileage of the roundtrip distance between Cincinnati, Ohio (where the warehouse was located) and Manchester, Kentucky. This evidence was not disputed, nor was there any contradictory evidence in the case.

The testimony to which petitioners' objected involved those portions of their statements to the authorities in which each had implicated the other as

accompanying him on the previous trips to Knuckles' store. Also involved were statements by Smith that he had been approached by Brown about engaging in the thefts (App. 143), and that Brown had prepared lists of the merchandise to be stolen (App. 137-141). An objection was also made to testimony about the amount of money that the non-declarant had received from Knuckles for their joint efforts (App. 134-135).

As in *Harrington* and *Schneble*, however, each petitioner had himself admitted his involvement in the crime (App. 128-129, 146-147, 220-221). Moreover, the fact that petitioners were together during the prior thefts was established directly by eye-witness testimony concerning their activities at Knuckles' store. They were arrested together while admittedly attempting another delivery of stolen merchandise to Knuckles. And each petitioner admitted he had been paid by Knuckles for the stolen merchandise. Thus, the challenged *Bruton* references were merely cumulative. See *Harrington v. California*, *supra*, 395 U.S. at 254.

On this record, therefore, the court below properly determined that admission of the challenged testimony was harmless error. The independent evidence here so overwhelmingly established petitioners' guilt that "the minds of an average jury" could not have found the government's case appreciably less persuasive had the cross-inculpatory statements been excluded. See *Schneble v. Florida*, *supra*, 405 U.S. at 432.²¹

²¹ The present case is, in this respect, even stronger than *Schneble*. In *Schneble*, the independent evidence consisted

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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OCTOBER 1972.

primarily of the defendant's own confession, the voluntariness of which was itself a fact question for the jury. See Mr. Justice Marshall's dissent in *Schneble* (405 U.S. at 432-437). Here, by contrast, petitioners' own confessions comprise but a part of the independent evidence. Moreover, as we have stated, petitioners were admittedly advised of their constitutional rights before making any statements to the authorities; there is no controversy here over the fact that their confessions were voluntary and otherwise admissible under *Miranda v. Arizona*, 384 U.S. 436.

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 390 U.S. 321, 327.

SUPREME COURT OF THE UNITED STATES

Syllabus

BROWN ET AL. V. UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 71-6193. Argued December 7, 1972—Decided April 17, 1973

Petitioners were convicted of transporting and conspiring to transport stolen goods in interstate commerce to their coconspirator, whose retail store was searched under a defective warrant while petitioners were in custody in another State. The charges against petitioners were limited to acts committed before the day of the search. At a pretrial hearing on petitioners' motion to suppress evidence seized at the store, petitioners alleged no proprietary or possessory interest in the store or the goods, and the District Court denied their motion for lack of standing. At petitioners' trial, the seized goods were introduced into evidence. In addition, police testimony as to statements by petitioners implicating each other were introduced into evidence in a manner contrary to *Bruton v. United States*, 391 U. S. 123. The Court of Appeals concluded that the *Bruton* error was harmless in view of overwhelming independent proof of guilt and affirmed the District Court's ruling on standing. *Held*:

1. Petitioners had no standing to contest the admission of the evidence seized under the defective warrant since they alleged no legitimate expectation of privacy or interest of any kind in the premises searched or the goods seized; they had no "automatic" standing under *Jones v. United States*, 362 U. S. 257, as the case against them did not depend on possession of the seized evidence at the time of the contested search and seizure; and they could not vicariously assert the personal Fourth Amendment right of the store owner in contesting admission of the seized goods. Pp. 4-7.

2. The testimony erroneously admitted was merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury, and the *Bruton* error was harmless. Pp. 7-9. 462 F. 2d 868, affirmed.

BURGER, C. J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-6193

Joseph Everette Brown and
Thomas Dean Smith,
Petitioners,
v.
United States.

On Writ of Certiorari to
the United States Court
of Appeals for the Sixth
Circuit.

[April 17, 1973]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

Petitioners were convicted by a jury of transporting stolen goods and of conspiracy to transport stolen goods in interstate commerce, contrary to 18 U. S. C. § 2314 and 18 U. S. C. § 371. The central issue now is whether petitioners have standing to challenge the lawfulness of the seizure of merchandise stolen by them but stored in the premises of one Knuckles, a co-conspirator. At the time of the seizure from Knuckles, petitioners were in police custody in a different State. Knuckles successfully challenged the introduction of the stolen goods seized from his store under a faulty warrant, and his case was separately tried.

The evidence against petitioners is largely uncontroverted. Petitioner Brown was the manager of a warehouse in Cincinnati, Ohio, owned by a wholesale clothing and household goods company. He was entrusted with the warehouse keys. Petitioner Smith was a truck driver for the company. During 1968 and 1969, the company had experienced losses attributed to pilferage amounting to approximately \$60,000 each year. One

West, a buyer and supervisor for the company, recovered a slip of paper he had seen drop from Brown's pocket. On the slip, in Brown's handwriting, was a list of warehouse merchandise, together with a price on each item that was well below wholesale cost. West estimated that the lowest legitimate wholesale price for these items would have been a total of about \$4,400, while the total as priced by Brown's list was \$3,200. The police were promptly notified and set up a surveillance of the warehouse. Ten days later, petitioners were observed wheeling carts containing boxes of merchandise from the warehouse to a truck. From a concealed point, the police took 20 photographs of petitioners loading the merchandise onto the truck. Petitioners then locked the warehouse, and drove off. They were followed and stopped by the police, placed under arrest, advised of their constitutional rights, and, with the loaded truck, taken into custody to police headquarters. The goods in the truck had not been lawfully taken from the warehouse and had a total value of about \$6,500.

Following their arrest, and after being fully informed of their constitutional rights, both petitioners made separate confessions to police indicating that they had conspired with Knuckles to steal from the warehouse, that they had stolen goods from the warehouse in the past, and that they had taken these goods, on two occasions about two months before their arrest, to Knuckles' store in Manchester, Kentucky. Petitioners also indicated that they had "sold" the previously stolen goods on delivery to Knuckles for various amounts of cash. Knuckles' store was then searched pursuant to a warrant, and goods stolen from the company, worth over \$100,000 in retail value, were discovered. Knuckles was at the store during the search, but petitioners were in custody in Ohio.

Prior to trial, petitioners and Knuckles¹ moved to suppress the stolen merchandise found at Knuckles' store. The prosecution conceded that the warrant for the search of Knuckles' store was defective. The District Court held a hearing on standing to suppress the evidence. Petitioners, however, alleged no proprietary or possessory interest in Knuckles' premises or in the goods seized there, nor was any evidence of such an interest presented to the District Court. After the hearing, the District Court granted Knuckles' motion to suppress the goods seized, but denied petitioners' motion for lack of standing. The charges against Knuckles were severed for separate trial.

At petitioners' trial, stolen merchandise seized from Knuckles' store was received in evidence. The events leading to petitioners' arrests upon leaving the warehouse and while in possession of stolen goods were fully described by police officers, who were eyewitnesses. The 20 photographs taken of the crime in progress were admitted into evidence. There was additional incriminating testimony by the owner of the service station from whom petitioners rented trucks used in the thefts and by five witnesses who saw petitioners unloading boxes from a truck late at night and carrying the boxes into Knuckles' store. The prosecutor also introduced into evidence, over petitioners' objections, portions of each petitioner's confession which implicated the other in a manner now conceded to be contrary to *Bruton v. United States*, 391 U. S. 123 (1968). Those considerable parts of petitioners' confessions which did not implicate the other were admitted without objection. The jury returned verdicts of guilty on all counts.

¹Knuckles was joined in the conspiracy count and was also charged with having received stolen merchandise, contrary to 18 U. S. C. § 2316.

On appeal, the Court of Appeals for the Sixth Circuit recognized that a *Bruton* error had occurred, but went on to conclude that the independent proof of petitioners' guilt was "so overwhelming that the error was harmless," citing *Harrington v. California*, 305 U. S. 250 (1969). The Court of Appeals also held that the stolen merchandise seized pursuant to the defective warrant was properly admitted against petitioners, stating:

"This ruling [of the District Court] was correct because appellants claimed no possessory or proprietary rights in the goods or in Knuckles' store, and it is clear that they cannot assert the Fourth Amendment right of another." 452 F. 2d 868, at 870 (1971).

(1)

Petitioners contend that they have "automatic" standing to challenge the search and seizure at Knuckles' store. They rely on the decision of this Court in *Jones v. United States*, 362 U. S. 257 (1962), establishing a rule of "automatic" standing to contest an allegedly illegal search where the same possession needed to establish standing is "an essential element of the offense charged." *Simmons v. United States*, 390 U. S. 377, 390 (1968). That case involved (a) a seizure of contraband narcotics, (b) a defendant who was present at the seizure,^{*} and (c) an offense in which the defendant's possession of the seized narcotics at the time of the contested search and seizure was a critical part of the government's case. *Jones, supra*, 362 U. S., at 263. Justice Frankfurter, writing

^{*} Presence of the defendant at the search and seizure was held, in *Jones*, to be a sufficient source of standing in itself. *Jones, supra*, 362 U. S., at 267. Here, of course, petitioners were not present at the contested search and seizure, but were in police custody in a different State. See *Wong Sun v. United States*, 371 U. S. 471, 402 n. 18 (1963).

for the Court in *Jones*, emphasized the "dilemma" inherent in a defendant's need to allege "possession" to contest a seizure, when such admission of possession could later be used against him. *Jones, supra*, 362 U. S., at 362-364. Justice Frankfurter quoted the words of Judge Learned Hand:

"Men may wince at admitting that they were the owners, or in possession, of contraband property; may wish at once to secure the remedies of a possessor, and avoid the perils of the part; but equivocation will not serve. If they come as victims, they must take on that role, with enough detail to cast them without question. The petitioners at bar shrank from that predicament; but they were obliged to choose one horn of the dilemma." *Connolly v. Medalis*, 53 F. 2d 629, 630.

The self-incrimination dilemma, so central to the *Jones* decision, can no longer occur under the prevailing interpretation of the Constitution. Subsequent to *Jones*, in *Simmons v. United States, supra*, we held that a prosecutor may not use against a defendant at trial any testimony given by that defendant at a pretrial hearing to establish standing to move to suppress evidence. 390 U. S., at 389-394. For example, under the *Simmons* doctrine the defendant is permitted to establish the requisite standing by claiming "possession" of incriminating evidence. If he is granted standing on the basis of such evidence, he may then nonetheless press for its exclusion; but, whether he succeeds or fails to suppress the evidence, his testimony on that score is not directly admissible against him in the trial. Thus, petitioners in this case could have asserted, at the pretrial suppression hearing, a possessory interest in the goods at Knuckles' store without any danger of incriminating themselves. They did not do so. (heba wadqaz)

But it is not necessary for us now to determine whether our decision in *Simmons*, *supra*, makes *Jones* "automatic" standing unnecessary. We reserve that question for a case where possession at the time of the contested search and seizure is "an essential element of the offense charged." *Simmons*, *supra*, 390 U. S., at 390. Here, unlike *Jones*, the government's case against petitioners does not depend on petitioners' possession of the seized evidence at the time of the contested search and seizure.³ The stolen goods seized had been transported and "sold" by petitioners to Knuckles approximately two months before the challenged search. The conspiracy and transportation alleged by the indictment were carefully limited to the period before the day of the search.

In deciding this case, therefore, it is sufficient to hold that there is no standing to contest a search and seizure where, as here, the defendants: (a) were not on the premises at the time of the contested search and seizure; (b) had no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure. The vice of allowing the government to allege possession as part of the crime charged, and yet deny that there was possession sufficient for standing purposes, is not present. The government cannot be accused of taking "advantage of contradictory positions." *Jones v. United States*, *supra*, 362 U. S., at 263. See *United States v. Allsenberrie*, 424 F. 2d 1206, 1212-1214 (CA7 1970); *United States v. Cowan*, 396 F. 2d 83-86 (CA2 1968); *Nira v. United States*, 388 F. 2d 535, 537 (CA1 1968); *United States v. Bosza*, 365 F.

³ "Petitioner's conviction flows from his possession of the narcotics at the time of the search." *Jones*, *supra*, 362 U. S., at 263 (emphasis added).

2d 206, 223 (CA2 1966). Compare *United States v. Price*, 447 F. 2d 23, 29 (CA2 1971), cert. denied, 404 U. S. 912 (1971).

Again, we do not decide that this vice of prosecutorial self-contradiction warrants the continued survival of *Jones* "automatic" standing now that our decision in *Simmons* has removed the danger of coerced self-incrimination. We simply see no reason to afford such "automatic" standing where, as here, neither the risk of defendant self-incrimination nor prosecutorial self-contradiction exists. Petitioners were afforded a full hearing on standing and failed to allege any legitimate interest of any kind in the premises searched or the merchandise seized. Nor, incidentally, does the record reveal any such interest.* As the Court of Appeals correctly concluded, petitioners had no standing to contest the defective warrant used to search Knuckles' store; they could not then and cannot now rely on the Fourth Amendment rights of another. "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted. *Simmons v. United States*, 300 U. S. 377 (1968); *Jones v. United States*, 362 U. S.

*Petitioners now contend that they had a partnership "property interest" in or "constructive possession" of the stolen goods found at Knuckles' store, as a conspiracy is a "partnership in crime." Even if the petitioners had not already "sold" the merchandise to Knuckles, their "property interest" in the merchandise was totally illegitimate. The "constructive possession" argument is equally ingenious, but equally unavailing. Even on the doubtful assumption that the alleged conspiracy between petitioners and Knuckles could support a "constructive possession" of the merchandise at Knuckles' store, the conspiracy was alleged to have continued only "to the 28th day of August 1970." The seizure was made on August 29, 1970. Finally, these contentions were not made in the courts below or in the petition for certiorari. They are, therefore, not properly before this Court. *Loew v. United States*, 355 U. S. 339, 362-363, n. 16 (1968).

257 (1955). *Alderman v. United States*, 394 U. S. 165, 174 (1969). See *Wong Sun v. United States*, 371 U. S. 471, 492 (1963).

EXHIBIT TO THE BRIEF (2)

The Solicitor General concedes that, under *Bruton*, *supra*, statements made by petitioners were improperly admitted into evidence. Neither of petitioners testified at the trial. The prosecution tendered police testimony as to statements made by Smith implicating Brown in the crimes charged, even though these statements were made out of Brown's presence.* This testimony was admitted into evidence. Similar statements, made by

* An FBI agent, Whitley, testified as follows:
"[Smith stated that] during June 1970, another individual who was also employed at Central Jobbing Company, one Joe Brown, had approached him and asked him to help steal merchandise from Central Jobbing Company and help him transport this merchandise to Manchester, Kentucky. He advised me that during June of 1970, he and Joe Brown made two trips to Manchester, Kentucky, with merchandise consisting of household goods and clothing which they had stolen from Central Jobbing Company. He recalled that to the best of his knowledge that these dates were June 5th and 20th, 1970. He said that he and Mr. Brown had received approximately one-half the value of the stolen merchandise from the owners of the . . . Knuckles Discount Store in Manchester, Kentucky, and that the owners of the Discount Store knew that the merchandise was stolen. Mr. Smith stated further that he had received approximately \$2,000.00 as his share of the money which they had received from the stolen merchandise."

Another witness, a Detective Hulgin from the County Sheriff's Patrol, had also testified to similar statements by Smith, adding that Smith had stated that the list, which was found by West at the warehouse, had been prepared and shown to him by Brown, and that the total price of \$2,300.00 shown on the list was the amount of money that petitioners were to receive for that particular shipment to Knuckles. Hulgin also testified that he was told by Brown that Smith had accompanied Brown on two previous occasions when Brown delivered stolen goods to Knuckles.

Brown relating to Smith, were also admitted. Petitioners' counsel made timely objections.

Upon an independent examination of the record, we agree with the Court of Appeals that the *Bruton* errors were harmless. The testimony erroneously admitted was merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury. In this case, as in *Harrington v. California*, 395 U. S. 250 (1969), the independent evidence "is so overwhelming that unless we say that no violation of *Bruton* can constitute harmless error, we must leave this . . . conviction undisturbed," 395 U. S., at 254. We reject the notion that a *Bruton* error can never be harmless. "[A] defendant is entitled to a fair trial but not a perfect one," for there are no perfect trials. *Bruton v. United States*, *supra*, 391 U. S., at 135, quoting *Lutwak v. United States*, 344 U. S. 604, 619 (1953). See *Schneble v. Florida*, 405 U. S. 427, 432 (1972); *Chapman v. California*, 386 U. S. 18, 23-24 (1967).

Affirmed.